(21,105.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 702.

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, PLAINTIFF IN ERROR,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 14, 1908.

1 THE UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

Pleas before the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, at a Term begun and holden at Sioux City, in said District, on the 2nd Tuesday of October, A. D. 1908, before Hon. Henry T. Reed, Judge of the Northern District of Iowa.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as the "BIG FOUR RAILWAY," Defendant; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO GREAT WESTERN RAILWAY COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants.

Be It Remembered, That heretofore to-wit on the 1st day of October 1906 a Bill of Exceptions in foregoing entitled cause was filed in the office of the Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, in words and figures following, to-wit:

2 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. At Law.

CHARLES A. DAVIS, Executor of the Estate of Frank R. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as the "BIG FOUR RAILWAY," Defendant; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO GREAT WESTERN RAILWAY COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants.

Certificate of the Trial Judge as to Transcript of the Record, Proceedings, and Papers upon which Judgment was Rendered.

This action was brought by the plaintiff to recover damages because of the injury done to the widow and next of kin of one Frank

E. Jandy, deceased, by the wrongful acts, negligence and default of the defendants, its agents, and employees in causing the death of said Frank E. Jandt, deceased, which injury and death was thus occasioned and occurred on or about the 28th day of September A. D. 1904, on which date the record shows that said Frank E. Jandt, now deceased, was engaged in the shipment of a car-load of horses from Chicago Illinois, to Earl Park, Indiana, and that said injury
3 and death occurred between the stations of Aroma and St. Anne, on the defendant's line of railway in the State of Illinois as is more particularly shown by the plaintiff's petition at law, which is hereafter and herein set out in full.

That said petition was filed in the District Court of Iowa in and for Woodbury County, for the May Term A. D. 1905. That said petition asked among other things for the issuance of writs of attachment and garnishment. A bond was given by the plaintiff as provided by law, and writs of attachment and garnishment were issued, which writs of attachment were levied upon certain cars belonging to the principal defendant in the possession of th- Chicago & Northwestern Railway Company, and other railway companies, as appears in the record more fully hereinafter set out.

The notices of garnishment were regularly served upon each of the garnishees companies, as provided by law, and each of the garnishee companies appeared and filed answer, each of which answers are hereinafter referred to and set out. Pleadings were filed by the plaintiff controverting the answers of each of the garnishee companies and asking that the evidence be taken on the issues joined, which pleadings are hereinafter referred to and set out.

An original notice was served upon the principal defendant at its principal place of business in the State of Ohio, and notice of attachment and garnishment were served upon the principal defendant at its principal place of business, in the State of Ohio, as provided by law, both of which are hereinafter referred to and set out.

After all this had taken place in the District Court of the State of Iowa, in and for Woodbury County, and returns thereon had been properly made and filed with the Clerk of said Court, the principal defendant filed a petition for removal of said cause from said State Court to the Circuit Court of the United States in and for the Northern District of Iowa Western Division, which petition
4 is herein and hereafter set out in full.

That upon said filing of said petition, and bond as required by law, the case, by order of the said District Court of the State of Iowa was regularly transferred to the said Circuit Court of the United States. That said case when filed in said Circuit Court of the United States was numbered 417.

That the principal defendant, thereafter, and on October 3rd 1905, filed herein what was denominated a motion to quash and set aside service, which motion was supported by affidavit attached thereto and made a part thereof, said motion and affidavit being herein and hereafter set out in full.

That by the said motion and affidavit in support thereof it was asserted and claimed among other things that each of the cars at-

tached were at the time of the attachment thereof, engaged in interstate commerce as a matter of fact, and for that reason were not subject to attachment.

In the same motion it was asserted and claimed that the Court had no jurisdiction over the defendant or the attached property of the defendant, or any of the funds or property involved in the garnishment proceedings, and it was moved to quash and set aside the service of the attachment and garnishment.

Plaintiff, within the time fixed by the Court and on October 13th, 1905, filed a resistance to the defendant's alleged special appearance and motion to quash and set aside service of writs of garnishment and attachment, which resistance was supported by affidavit- attached thereto and made a part thereof, which motion and resistance and affidavits in support of the same are herein and hereafter set out in full.

The issue- thus joined and presented were submitted to the Court upon the pleadings and affidavits, without the taking of any further evidence, or the offer of any by either party, and taken under
5 advisement, and on May 22nd, 1906, the Court rendered its decision thereon, and an entry was made of record dissolving the attachments, discharging the attached property and dismissing the action as to the garnishees, the full record entry of which is herein and hereafter set out in full, together with the plaintiff's exceptions thereto.

That on the 6th day of June A. D. 1906, the Court rendered further judgment, and entry of record was made thereof dismissing the plaintiff's cause of action as against the principal defendant without prejudice, and entering up judgment for costs in favor of the principal defendant. The full record entry of said dismissal, with the plaintiff- exceptions thereto are herein and hereafter set out in full.

The matters in this bill of exceptions contained were submitted to and determined by the Hon. Henry T. Reed, Judge,—Wilbur Owen and Thomas F. Bevington, appearing for the plaintiff in all of the proceedings, Shull & Farnsworth, attorneys, appearing for the principal defendant by what they termed a special appearance, in the said Circuit Court of the United States, the garnishees appearing by the respective attorneys whose names are signed to the various answers of the garnishees, the attorneys for the garnishees taking no part in the actual submission of the matters complained of in the said Circuit Court of the United States.

The Plaintiff's petition at law, filed in the District Court of Iowa in and for Woodbury County, for the May Term 1905, without here re-inserting the title, was as follows;—
6 "For cause of action Plaintiff states:

That he is the duly appointed, qualified and acting executor of the estate of Frank E. Jandt, deceased;

That the defendant is a railway corporation, organized and existing under the laws of the States of Ohio and Indiana, and running and operating a railway and lines of railway in the States of Ohio, Indiana and Illinois, and particularly that the defendant owns and

operates a line of railway for the transportation of freight and passengers running from Kankakee in the State of Illinois, southeasterly to Cincinnati in the State of Ohio.

That on the evening of September 27th, 1904 the said Frank E. Jandt, now deceased shipped a car load of horses from Chicago, Illinois to Earl Park, Indiana, said shipment proceeding to Kankakee, Illinois, over the tracks of the Illinois Central Railway and from there the car was taken over the tracks of the defendant and in charge of the defendant's agents, servants, and employés to its destination.

That the said deceased under his contract of shipment, and under the bill of lading issued to him and as is usual and customary in the case of transportation of live stock, accompanied said carload of horses as owner in charge of the same, riding the caboose of said train which was known as first section of No. 08.

That early in the morning of September 28th, 1904 and while the said Frank E. Jandt deceased, was so riding in the caboose of the defendant's said train, and at a point on defendant's said line of railway between the stations of Aroma and St. Anne, in the said State of Illinois, the train in which deceased was riding, known as the first section of No. 98, became stalled or stuck upon a hill and was unable to proceed and while standing upon said hill the defendant by and through its employés and agents, carelessly and negligently permitted and caused the second section of No. 98 to collide with and run into said first section of No. 98 with great force and vio-
7 lence, demolishing and telescoping the caboose in which the said Frank E. Jandt was riding and by reason of said collision the said Frank E. Jandt was then and there crushed and killed.

That said accident and collision was not caused by any acts, default or negligence of the said deceased, and that at the time thereof the said deceased was exercising due care and prudence; but that said collision was wholly caused by the gross negligence carelessness and default of the defendant and its employés, in their careless reckless and negligent operation of its two trains aforesaid, resulting in the death of the deceased as aforesaid.

That the said defendant left surviving him, and dependent upon him for support, and maintenance, a wife, Margaret A. Jandt, and two daughters, M. Gertrude Jandt and Florence I. Jandt.

That at the time of said accident and death of said deceased, there existed in the State of Illinois, the following statutory provisions as amended.

CHAPTER 770.

"SECTION 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable in an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"SECTION 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, shall be distributed to such widow and next of kin, in proportion provided by law in relation to the distribution of personal property left by person dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from the death, — the wife and next of kin of such deceased person, not exceeding the sum of $10,000.00; provided that every such action shall be commenced within two years after the death of such person."

That an action has accrued to the said plaintiff as executor as aforesaid, to demand and have of this defendant compensa-
8 tion and *and* damages for the injury done to the widow and next of kin of said Frank E. Jandt, deceased, by the wrongful act, negligence and default of the defendant, its agents and employés, in causing the death of the said Frank E. Jandt deceased.

Wherefore, the said plaintiff as executor as aforesaid, demands judgment against the said defendant for the injury, and that it be adjudged to make the said plaintiff as such executor compensation in damages therefor in the amount of ten thousand dollars ($10,000.00) and costs of this action.

The plaintiff further states as ground for an attachment herein, that the defendant is a foreign corporation and a non-resident of the State of Iowa.

Wherefore the plaintiff asks that the Court may order a writ of attachment to issue against the property of the defendant.

BEVINGTON & McVAY,
WILBUR OWEN,
Attorneys for Plaintiff.

STATE OF IOWA, *Woodbury County:*

Charles A. Davis, being duly sworn states, that he is the executor of the last will of Frank E. Jandt, deceased, and is plaintiff in the above entitled action; that he has read the allegations contained in the foregoing petition, and that the same are true.

CHARLES A. DAVIS.

Subscribed in my presence and sworn to before me by the said Charles A. Davis, this 6th day of April 1905.

WILBUR OWEN,
Notary Public."

The order of the Court upon the reading of the said petition was as follows:

9 *Order.*

Upon reading the foregoing petition, it is ordered that a writ of attachment issue herein, upon the plaintiff's giving bond in the

sum of Thirty Thousand dollars ($30,000.00) with sureties as provided by law, to be approved by the Clerk of this Court, and that the Sheriff attach property of the defendant not exceeding in value fifteen thousand dollars ($15,000.00).

JOHN F. OLIVER,
Judge District Court, Woodbury County, Iowa."

Filed April 7, 1905.

WM. CONNIFF, *Clerk*,
By F. J. TRIPP, *Deputy.*"

The answer of the Chicago Rock Island & Pacific Railway Co., garnishee, without here repeating the title was as follows:

(Title.)

No. —.

Answer of Garnishee.

Now comes Chicago Rock Island & Pacific Railway Co., garnishee herein, and for answer as such garnishee, states:

That it is a corporation duly incorporated and existing under the laws of the State of Iowa.

That it is not indebted to the defendant Company in any manner or sum whatever, and that it does not owe the defendant any money or property.

That it has no rights or credits of the defendant in its possession or under its control, and that it does not know of any debts owing to the defendant or of any rights or credits belonging to it now in its possession or under the control of any other person.

That it does not have in its possession or under its control any property of the defendant, except under the conditions following, to-wit; that is to say:

This answering garnishee is a railway company owning and operating a line of railway extending through various states including Iowa and Nebraska, and as such is a common carrier of merchandise and passengers and as such is within duty bound under the law and does transport freight from one state to another, continuously without transferring such freight or goods from one car to another.

That the defendant company is also a railway corporation and as such is also a common carrier of freight and goods, owning and operating tracks in the State of Illinois, Indiana, and other States, but not in the State of Iowa, and that said defendant has no tracks and has no agency or agent in the State of Iowa, and is a foreign corporation.

That this garnishee and the defendant company had at the time of the service of the process in this case upon this garnishee and have now, existing arrangements, contracts and agreements by which this garnishee accepts from defendant defendant's cars loaded with mer-

chandise or other freight destined to points of shipment on this garnishee's line of railroad in the State of Iowa and elsewhere, under and by virtue of which existing arrangements and agreements this garnishee has the right to and is obliged to accept and transport said cars of defendant company to their destination.

And this garnishee is further obliged under the Acts of Congress and the laws of the United States as such common carrier, to transport such cars of defendant containing freight to their destination without transferring such goods or freight from said cars, and that such contracts, arrangements and agreements so stated, and the use of said cars by this garnishee is necessary to enable this garnishee to discharge its duties to the public as such common carrier. That under and by reason of the existence of such arrangements and agreements as herein stated, this garnishee had in its possession at the time of the service of the various writs of attachments and garnishment, cars of the defendant company, as follows: No. 14,329.

That said cars and each and every one of them were so in the possession of this garnishee under and by reason of the agreements and arrangements heretofore stated and for no other purpose
11 whatever, and contained freight and goods to be delivered at various points in this State; then as soon as practicable and without any unnecessary delay or for any other purpose, were to be returned either empty or re-loaded in the usual and customary course of business; and that such cars were and are while so in the possession of this garnishee, engaged in interstate commerce, and that by reason thereof said cars are not subject to attachment or garnishment, and should be released by order of this Court from such attachment.

Wherefore this garnishee asks that it be discharged with its costs and that all of the cars so in its possession belonging to the defendant be released from the attachment and garnishment herein.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO.,
By WRIGHT & CALL, *Its Attorneys.*

STATE OF IOWA, *Woodbury County, ss:*

C. L. Wright being first duly sworn according to law, deposes and says; that he is one of the attorneys for this answering garnishee, that he has read the foregoing answer and the facts therein stated are true as he verily believes, that as such attorney he is authorized to make this verification on behalf of it.

C. L. WRIGHT.

Subscribed and sworn to by C. L. Wright before me this 28th day of April 1905.

[SEAL.] MECCA PAVEY,
Notary Public in and for Woodbury County, Iowa.

Filed May 1, 1905.

WM. CONNIFF, *Clerk,*
By P. J. TRIPP, *Deputy.*"

12 The answer of the Wilmar & Sioux Falls Ry. Co., garnishee, was the same as the answer of the first named garnishee, except where the name of said garnishee appears, and except that it is alleged therein that it is a corporation duly incorporated and existing under the laws of the State of Minnesota; and except that the cars of the principal defendant, attached and garnished in its possession are numbers 17,405, and 16,658. The appearance for said Company was by Wright & Call, of Sioux City, Iowa, its attorneys, and its answer was filed May 1st, 1905.

The garnishee, Chicago, St. Paul, Minneapolis and Omaha Ry. Co. appeared by Wright & Call of Sioux City, Iowa, its attorneys, and its answer was the same as the answer of the first named garnishee, except where the name of the garnishees appear therein, and except that it is averred that it is a corporation duly incorporated and existing under the laws of the State of Wisconsin, and except that the car of the principal defendant attached and garnished in its possession is number 16,839. Its answer was filed May 1st, 1905.

The garnishee Chicago Milwaukee & St. Paul Railway Company appeared by Shull & Farnsworth of Sioux City Iowa, its attorneys, and its answer was the same as the answer of the first named garnishee, except where the name of the garnishee appears, and except that it is averred that it is a corporation duly incorporated and existing under the laws of the State of Wisconsin, and except that the cars of the principal defendant attached and garnished in its possession are numbers 6445, 15,333, and 14,739. Its answer was filed May 1st, 1905.

The garnishee Chicago Great Western Railway Company appeared by J. W. Hellam, of Sioux City, Iowa, its attorney, and its answer was the same as the answer of the first named garnishee, except where the name of the garnishee appears, and except that it is averred that it is a corporation duly incorporated and existing under and by virtue of the laws of the State of Illinois, and except that the car of the principal defendant attached and garnished in its possession is number 10,425, which car was consigned to Omaha Neb. Its answer was filed May 1st, 1905.

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The answer of the garnishee Chicago & Northwestern Railway Company, without here repeating the title, was as follows.

Title.

Answer of Garnishee.

Now comes the Chicago & Northwestern Railway Company, summoned as garnishee in the above entitled cause, and for answer as such garnishee, states:

1st. The Chicago & Northwestern Railway Company is not in any manner indebted to the defendant in this action, and does not owe it any money or property which is not yet due.

2nd. The said garnishee has not in its possession, or under its control any property, rights or credits of the said defendant, except as hereinafter set forth.

3rd. The said garnishee does not know of any debts owing said defendant whether due or not due, or any property, rights or credits belonging to it, and now in the possession or under the control of others, except as hereinafter stated.

4th. The said Chicago & Northwestern Railway Company, as garnishee, further answering states, that at the date of the service of the respective notices of garnishment there was in its possession a freight car number 12,257, which car, at the time of the service of garnishment, was on the tracks of this garnishee, in the City of Sioux City, State of Iowa, also freight car No. 16,848, which at the date of the service of garnishment, was in the possession of this gar-
14 nishee company and was located on the tracks of this company in the city of Des Moines, Iowa; that this garnishee has not definite knowledge as to the ownership of said cars, except that same bear initials and letters which indicate that they might be the property of the defendant company; but your garnishee further states that the location of said cars was well known to the sheriff at the time of the service of the notices of garnishment, they were the character of property that could have been levied upon and taken into the manual possession of the said sheriff, and that the said cars located and situated as herein described were not the subject of garnishment.

5th. Garnishee further answering states, that the said cars above described and identified by numbers as 12,257 and 16,848, came into the possession of this garnishee while engaged in inter-state commerce, and were brought into the State of Iowa under and by virtue of section 5258 of the Revised Statutes of the United States, and the said cars at the time of the levy, were engaged in interstate commerce.

Garnishee further states that the said cars came into its possession under an arrangement and understanding which existed between the defendant company and the garnishee company, that as soon as the said cars were unloaded they should be returned with all possible dispatch to the said defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; that the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company is a corporation that is not a resident of the State of Iowa, and has no lines of track or offices in the State of Iowa, and the cars above described are part of the equipment of the defendant company essential to its carrying on the business of a common carrier, and are the character of property and in the State of Iowa under such conditions and obligations as render them exempt from either levy or attachment or garnishee, process in the State of Iowa.

Wherefore, this garnishee having fully answered prays that
15 it be dismissed from further liability in this case and authorized to return to the defendant company the said freight cars above described.

CLARK & McLAUGHLIN AND
JAMES C. DAVIS,
Attorneys for Garnishee.

STATE OF IOWA, *Polk County, ss:*

I, James C. Davis, on my oath do state; that I am attorney for the state of Iowa for the Chicago & Northwestern Railway Company, garnishee above named; that I am acquainted with the facts set forth in the foregoing answer, and the same are true as I verily believe.

JAMES C. DAVIS.

Subscribed in my presence and sworn to before me by said James C. Davis, this 29th day of April 1905.

[SEAL.] A. A. McLAUGHLIN,
Notary Public in and for Polk County, Iowa.

Filed May 1, 1905.

WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

The answer of the garnishee, Chicago Burlington & Quincy Railroad Company without here repeating the title was as follows.

(Title.)

Answer of Garnishee.

Now comes the Chicago Burlington, & Quincy Railroad Company, garnishee herein, and for answer as such garnishee, states:

That it is a corporation duly incorporated and existing under the laws of the State of Illinois.

That it is not indebted to the defendant company in any manner or sum whatsoever, and that it does not owe the defendant any money or property.

That it has no rights or credits of the defendant in its possession or under its control, and that it does not know of any debts owing to the defendant or any rights or credits belonging to it now in
16 the possession or under the control of any other person.

That it does not have in its possession or under its control any property of the defendant,

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By SHULL & FARNSWORTH AND H. J. NELSON, *Its Attorneys.*

STATE OF MISSOURI, *County of Buchanan, ss:*

H. J. Nelson, being first duly sworn according to law deposes and says that he is one of the attorneys for this answering garnishee; that he has read the foregoing answer and the facts therein stated are true; as he verily believes. That as such attorney he is authorized to make this verification on behalf of it.

H. J. NELSON.

Subscribed and sworn to by H. J. Nelson, before me this 8th day of May, 1905.

[SEAL.] CRETES MITCHELL,
Notary Public in and for Buchanan County, Missouri.

My term expires 8/1/1908.

Filed May 10, 1905.

WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

The answer of the garnishee, Union Pacific Railroad Company was the same as the answer of the first named garnishee, except where the name of the garnishee appears, and except that it is alleged that it is a corporation duly organized and existing under the laws of the State of Utah, and except that the cars of the principal defendant attached and garnished in its possession are numbers 9,586, 13,250, 11,632, 23,163. Its appearance was by W. A. Kelley of Omaha, Nebraska; and John N. Baldwin, of Council Bluffs, Iowa, its attorneys, and its answer was filed May 11th, 1905.

The answer of the garnishee, Illinois Central Railroad
17 Company without here repeating the title, was as follows:

Title.

Answer of Garnishee.

Now comes the Illinois Central Railroad Company, garnishee herein, and for answer as such garnishee, states:

That it is a corporation duly incorporated and existing under the laws of the State of Illinois.

That the said defendant and garnishee have mutual accounts existing between them in the nature of running accounts, and that it is impossible to state accurately at any particular date which company is indebted to the other; but the said garnishee from examination of its accounts states, that on the date of the garnishment in this case, it was not indebted to defendant company according to its best knowledge or information, or in any manner or sum whatever, and that it did not owe the defendant company any money or property; that it has no rights or credits of defendant in its possession or under its control, and that it does not know of any debts owing to defendant, or of any rights or credits belonging to it now in the possession or under the control of any other person.

That it is impossible for garnishee to state as to any particular debt owing to said defendant, or owing by defendant to it, unless it be of some debt where a balance can be struck, which would be on the last day of every month, and garnishees aver- its willingness to make answer as to any amount due to said defendant or any amount due by it to garnishee on the last of any month, it being impossible from the intricate condition of the business affairs of the defendant and said garnishee to state in exact terms the balance existing in

favor of either company growing out of their interchange of business, that at any other date than as herein set forth.

18 And for these reasons garnishee avers from the best of its knowledge and belief, that it was not in any way indebted to said defendant company on the 18th day of April 1905, and is not now so indebted but avers its belief to be that the said defendant company was indebted to garnishee on the 18th day of April 1905, and is now indebted.

Garnishee further avers that it does not have in its possession or under its control any property of defendant except as follows, to-wit: One box car which has been taken by attachment in the City of Sioux City, Iowa, that the same is in the possession of garnishee under the following conditions, to-wit: That garnishee is a railway company owning and operating a line of railway extending through various states including the State of Iowa, and as such is a common carrier of merchandise and passengers and as such is in duty bound under the law to transport freight, and does transport freight from one state to another continuously, without transferring such freight or goods from one car to another.

That defendant is also a railway corporation and as such as a common carrier of freight and goods, ow-ing and operating tracks in the State- of Illinois, Indiana and other States, but not in the State of Iowa, and that said defendant has no tracks and has no agency or agents in the State of Iowa, and is a foreign corporation.

That this garnishee and defendant company had at the time of the service of the process in this case upon this garnishee, and now has existing arrangements, contracts and agreements by which this garnishee accepts from defendant its cars loaded with merchandise or other freight destined to points of shipment on the garnishee's line of railroad in the State of Iowa, and elsewhere, and under and by virtue of which agreements, this garnishee accepts and transports cars of defendant company to their destination, and as such common carriers has the right to use of such cars during the time necessary to transport and return same in the usual course of business.

19 This garnishee further states that it is obliged under the Acts of Congress as such common carrier, to transport cars of defendant containing freight, to their destination without transferring such goods or freight from said cars and that such contract, arrangements and agreements so stated, and the use of such cars by this garnishee is necessary to enable said garnishee to discharge its duties to the public as a common carrier.

That at the time of the service of garnishment, the said garnishee had in its possession one car of the defendant company which car has been attached under a writ issued in this case. That said car was in the possession of this garnishee by reason of the agreements and arrangements heretofore stated, and for no other purpose whatever, and contained, as garnishee believes and understands, freight, and goods to be delivered at various points in the State of Iowa, and that that car in the commerce between the States was without unnecessary delay to be returned in the usual and customary course of business to defendant company, and that such car was while

in the possession of this garnishee engaged in inter-state commerce and that by reason thereof said car was not subject to attachment or garnishment and should be released by order of this Court from such attachment.

Wherefore, garnishee, having fully answered, asks that it be discharged with its costs in such garnishment proceeding, and that the car attached in said garnishment proceeding be discharged.

W. S. KENYON &
HENDERSON & FRIBOURG.

STATE OF IOWA, *Webster County, ss:*

I, W. S. Kenyon, being first duly sworn according to law, depose and say that I am one of the attorneys for the answering garnishee; that I am as well acquainted with the matters set forth in the foregoing answer as any officers of the company, and that I make answer on behalf of said company, and with due authority so to make the same. That I have read the foregoing answer and the facts therein stated are true as I verily believe.

W. S. KENYON.

Subscribed and sworn to by W. S. Kenyon, before me this 15th day of May 1905.

[SEAL.] MAURICE KINNI,
Notary Public in and for said County.

Filed May 16, 1905.

WM. CONNIFF, *Clerk,*
By J. F. TRIPP, *Deputy.*

The Answer of the Sioux City Stock Yards Company, without here repeating the title was as follows:

(Title.)

Answer of Garnishment.

Comes now the Sioux City Stock Yards Company, garnishee in the above entitled cause, and by F. L. Eaton, its president, under oath, and its corporate seal, makes answer.

The Sioux City Stock Yards Company, a corporation, states that it is not in any manner indebted to the defendant in this suit, and does not owe it any property or money, due or not due; nor was it so indebted, nor did it owe defendant any money or property due or not due, at the time of the service of notice of garnishment in this cause; that it has not in its possession or under its control, nor did it have at the time of the service of said notice of garnishment, any property, rights or credits of the defendant.

In Witness Whereof the Sioux City Stock Yards Company has

caused this answer to be made by its president and general manager, under oath and its corporate seal.

THE SIOUX CITY STOCK YARDS COMPANY,
[SEAL.] By F. L. EATON,
President and General Manager.

21 STATE OF IOWA, *Woodbury County, ss:*

I, F. L. Eaton, being first duly sworn, say that I am president and general manager of the Sioux City Stock Yards Company a corporation, garnishee in the above entitled cause; that I have read its foregoing answer and know the contents thereof, and the statements therein made are true; that I as such president make such answer on behalf of said company, and have attached the corporate seal of said company thereto.

F. L. EATON.

Subscribed and sworn to before me by the said F. L. Eaton, on this 7th day of August 1905.

[SEAL.] WALTER P. DICKEY,
Notary Public of Iowa in and for Woodbury County.

Filed Aug. 9, 1905.

WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

The pleadings of the plaintiff controverting the answers of each of said garnishees were filed as to each of the answers of said garnishees separately, except as to the answer of the Sioux City Stock Yards Company, which was not controverted, on May 19, 1905, and each of which without here repeating the titles, *were* as follows:

(Title.)

Pleading Controverting Answer of Garnishee.

Comes now the plaintiff in the above entitled action, and filed this his pleading controverting the answer of the above named garnishee, and as grounds therefor, states:

That he denies each and every allegation, matter and thing in said answer contained, except such as are hereinafter admitted or otherwise answered.

22 The plaintiff further controverting the answer of said garnishee avers the fact to be that said garnishee and the person making answer for it made no examination of the books of the principal defendant company, or the garnishee's company, to ascertain whether or not there was anything due from the garnishee company to the principal defendant company, and further avers the fact to be that the garnishee company at the time of the levy of the writ of attachment and notice of garnishment, had in its possession property rights and credits belonging to the principal defendant.

Further controverting the answer of said garnishee the plaintiff denies that said garnishee and the principal defendant company had at the time of the service of the process in this case upon the garnishee existing arrangements or contracts or agreements such as are alleged in the answer of the said garnishee.

Further controverting said answer the plaintiff avers that the cars referred to in the answer of said garnishee were at the time of the levy of attachment and service of garnishment in the above entitled case, empty cars, and were not engaged in inter-state commerce; and that no arrangement had been made at said time to load said cars and it was not contemplated to load them.

Further answering said answer, plaintiff avers that at the time of the service of notice of garnishment said cars were levied upon under a writ of attachment properly issued in the above entitled case; that said garnishee had at said time no interest in said property entitling it to raise the question of the legality of said attachment; that it is a question that can only be raised by and between the plaintiff and the defendant company.

Wherefore the plaintiff asks and prays that it may be awarded a hearing and be permitted to take evidence controverting the answer of said garnishee, as provided by law.

WILBUR OWEN,
THOS. F. BEVINGTON,
Attorneys for Plaintiff.

Filed May 19, 1905.

WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

23 Three separate writs of attachment were regularly issued in the regular Iowa form, the first one being directed to C. W. Jackson, Sheriff of Woodbury County, Iowa, issued and delivered to him on the 7th day of April A. D. 1906, which is as follows:

Whereas, Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, has filed his petition under oath in the office of the Clerk of the District Court of said County, stating that Cleveland, Cincinnati, Chicago & St. Louis Railway Co., is justly indebted to him in the sum of ten thousand dollars, and as deponent verily believes, the said Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., is a foreign corporation and a non-resident of the State of Iowa, and asking that a writ of attachment may is-ue against the goods, chattels, lands, tenements, and effects of the said C. C. C. & St. L. Ry. Co., or so much thereof as may be necessary to secure the said sum of ten thousand dollars, and the said Charles A. Davis, Executor, having filed his bond in the sum of thirty thousand dollars conditioned that the said Charles A. Davis, Executor, will pay all the damages which the said C. C. C. & St. L. Ry. Co., may sustain by reason of the wrongful suing out of the writ of attachment.

Therefore, these are in the name of the State of Iowa, to commend you to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of the said Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., wherever the same may be found in your county,

or so much thereof as may be necessary to satisfy the above stated indebtedness, together with interest and costs of suit, and safely to preserve the same to be dealt with according to law. And make legal return for your doings in the premises to the said District Court of said County, on the first day of the next term thereof, to be holden at the Court house in Sioux City, Iowa, in said County, on
24 the 1st day May, A. D. 1905.

In Testimony Whereof, I, Wm. Conniff, Clerk of said Court, have hereunto subscribed my name and affixed the seal of said Court at my office in Sioux City Iowa this 7th day of April A. D. 1905.

[SEAL.]

WM. CONNIFF,
Clerk District Court.

Received April 7, 1905 at 1:45 P. M.
C. W. JACKSON, *Sheriff.*

Filed April 29, 1905.
WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

The sherriff's return thereon was as follows:

Sheriff's Return to Annexed Writ.

STATE OF IOWA, *Woodbury County:*

I, C. W. Jackson, Sheriff, of said County do hereby certify and return, that the within writ of attachment came into my hands on the 7th day of April 1905, at 1:45 P. M. and on the 7th day of April 1905, at 4 p. m. by virtue thereof, I attached Chicago & Northwestern Ry. Co., as garnishee by reading to J. P. Campbell, the notice of garnishment which is hereto attached, marked Exhibit "A" and by delivering to him a true copy thereof.

And on the 7th day of April 1905, at 4:07 I attached Chicago St. Paul Minneapolis & Omaha Ry. Co., as garnishee, by reading to O. M. Scott, Chief Clerk, the notice of garnishment which is hereto attached, marked Exhibit "A" and by delivering to him a true copy thereof.

And on the 7th day of April 1905, at 4:35 P. M. I attached Chicago Milwaukee & St. Paul Ry. Co., as garnishee, by reading to L. B. Beardsley, Supt., the notice of garnishment which is hereto attached marked Exhibit "A" and by delivering to him a true copy thereof.

And on April 15, 1905, I attached Willmar & Sioux Falls Ry. Co. by reading to T. E. Princen notice of garnishment marked Exhibit "A" and delivering him a true copy thereof.

25 And on the 18th day of April 1905, at — m., I attached Illinois Central Ry. Co., as garnishee, by reading to Chas. Evert, Chief Clerk the notice of garnishment which is hereto attached marked Exhibit "A" and delivering to him a true copy

thereof: Notice of garnishment and levy could not be served upon defendant within State of Iowa, not being found therein.

All done in Woodbury County, Iowa.

C. W. JACKSON, *Sheriff*,
E. W. PECAUT AND
W. H. BARKER, *Deputy*.

Service	$2.00
Notice of Garnishment	1.50
Mileage	.50
Copies	1.25
Total	5.25

STATE OF IOWA, *Woodbury County, ss:*

I, C. W. Jackson, Sheriff, further certify and return that under the within and attached writ of attachment, I levied upon the following numbered box cars of the defendant company, said cars being numbered 12,257, 16,839, 15,353, 13,289, 17,406, 6,445, 16,658 and 14,739 respectively; that notice of said levy could not be served upon the defendant being a foreign corporation having no place of business within the said Woodbury County; notice of such levy was posted upon each of said cars; and said notice also served upon the railroad company in whose possession the said cars were found. That I now have said cars in my possession as by law required. All done in Woodbury County.

C. W. JACKSON, *Sheriff*,
By W. H. BARKER, *Deputy*.

26 The next one referred to was issued on the same day to-wit; April 7th, A. D. 1905, directed to the Sheriff of Pottawattamie County Iowa, which was the same in every particular as the first writ herein referred to; it was received by Ed. Canning Sheriff, April 10, A. D. 1905, and was filed with the return thereon August 23rd, 1905, proof of service and return thereon being as follows:

Proof of Service.

STATE OF IOWA, *Pottawattamie Co., ss:*

The within writ of attachment came into my hands for service on the 10th day of April A. D. 1905, and I garnished the following railroad companies, to-wit, as shown by notices of garnishment attached hereto and made a part of this return; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago Milwaukee Railway Company; Chicago Rock Island & Pacific Railway Company, and the Union Pacific Railroad Company.

I also attached the property of the defendant, the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., to-wit, Car No. 14,329 at

the Chicago Rock Island & Pacific Railway Co., Car No. 4,052 at the Chicago Milwaukee & St. Paul Railway Company; Car No. 10,425 at the Chicago & Great Western Railway Company; Cars Nos. 13,395, and 14,855 at the Chicago Burlington & Quincy Railroad Company; Cars Nos. 9,856, 13,250, 11,632, and 23,163 at the Union Pacific Railroad Company, as shown by notice of levy and attachment, attached hereto and made a part of this return.

EDWARD CANNING,
Sheriff of Pottawattamie County,
By W. A. GRONEWG, *Deputy.*

Sheriff's fee $15.00.

The Third was issued on the 8th day of June 1905, and directed to C. W. Jackson, Sheriff of Woodbury County Iowa, and was the same as the first writ of attachment referred to herein. It was received by the Sheriff June 8th, A. D. 1905, and filed with
27 the return thereon with the Clerk of the District Court of Woodbury County, Iowa August 31st, 1905 the return being as follows:

Sheriff's Return and Annexed Writ.

STATE OF IOWA, *Woodbury County:*

I, C. W. Jackson, Sheriff of said County do hereby certify and return that the within writ of attachment came into my hands on the 8th day of June 1905, at 3:30 p. m. and on the 8th day of June 1905, at 4:05 p. m. by virtue thereof I attached the Sioux City Stock Yards Co., as garnishee by reading to F. L. Eaton, president and Gen. Manager of the said Sioux City Stock Yards Co., the notice of garnishment which is hereto attached, marked Exhibit "A" and by delivering him a true copy thereof.

And on the 8th day of June 1905, at 4:45 P. M. I attached Chicago & Northwestern Ry. Co., as garnishee by reading to M. M. Betzner Gen. Agent of the Chicago & Northwestern Ry. Co., the notice of garnishment which is hereto attached marked Exhibit "A" and by delivering to him a true copy thereof.

All done in Woodbury County, Iowa.

C. W. JACKSON, *Sheriff,*
W. H. BARKER, *Deputy.*

Fees.

Service	$2.00
Notice of Garnishment	.75
Mileage	.30
Copies	.50
Total	3.55

Notices of garnishment in the regular form were served on each of the garnishee companies, and in each case upon the principal de-

fendant, all of which were returned and filed with the Clerk of the District Court of Iowa in and for Woodbury County, as provided by law, before the filing of the petition for removal, hereinbefore referred to.

Notices of the levy of attachment on the cars in question in the regular Iowa form were regularly served upon each of the
28 companies in whose possession cars of the principal defendant were found, and levied upon, which notices were served by the Sheriff of the respective counties hereinbefore referred to, regular returns made thereon, and the same, with the returns thereon were filed with the clerk of the District Court of Iowa in and for Woodbury County before the petition for removal was filed.

An original notice was served on the principal defendant as provided by law, which service was made in the County of Hamilton and State of Ohio, that being the defendant's principal place of business and said notice with the return thereon, was filed with the Clerk of the District Court of Iowa, in and for Woodbury County, before the petition for removal was filed, which original notice and the return thereon, without here repeating the title, are as follows:

Title.

Original Notice.

To Cleveland, Cincinnati, Chicago & St. Louis Railway Company:

You are hereby notified that there is now on file the petition of the plaintiff in the above entitled cause in the office of the Clerk of the District Court of the State of Iowa, in and for Woodbury County, claiming of you the sum of ten thousand dollars, as damages accruing to the widow and next of kin of Frank E. Jandt deceased, caused by the wrongful acts, neglect and carelessness of said Cleveland Cincinnati, Chicago & St. Louis Ry. Company, resulting in the death of said Frank E. Jandt in a railway collision between two trains upon said defendant company's road near Kankakee, Illinois, on the morning of September 28th, 1904, and that unless you appear thereto and defend before noon of the said second day of the next term, being the September term of the said court, which will commence at Sioux City Iowa, on the 5th day of September 1905, default will be entered against you and judgment and decree rendered thereon, as provided by law.

29 Dated this 25th day of May A. D. 1905.

THOMAS F. BEVINGTON AND
WILBUR OWEN,
Attorneys for Plaintiff.

Filed Sept. 6th, 1905.

WM. CONNIFF,
Clerk D. C.,
By F. J. TRIPP,
Deputy Clerk.

Fees $3.80 paid by W. O.

STATE OF OHIO, *County of Hamilton, ss:*

John Proctor, being first duly sworn, on oath deposes and says that he received the within notice on the 13th day of July 1905, and that he served the same on the within named defendants, Cleveland Cincinnati, Chicago & St. Louis Railway Company, by reading the same to E. F. Osborne, Secretary of said Railway Company, and by delivering to him a true copy thereof on the 14th day of July 1905.

All done in the City of Cincinnati, County of Hamilton, State of Ohio.

JOHN PROCTOR.

Sworn to before me and subscribed in my presence by the said John Proctor, this 14th day of July 1905.

[SEAL.] RUSSELL BLAIR,
Notary Public in and for Hamilton County, Ohio.

That the principal defendant's petition for removal was in regular and sufficient form and filed September 6th, 1905, with the Clerk of the District Court of Woodbury County Iowa.

That on the same day the principal defendant filed a sufficient removal bond as provided by law. That on September 7th, A. D. 1905 an order of removal was made by said District Court of the State of Iowa removing said case to the Circuit Court of the United States as provided by law; that on the 27th day of September A. D. 1905 a complete transcript of the record in said cause was made by William Conniff, Clerk of the District Court of Iowa in and for Woodbury County and properly certified to the said Circuit
30 Court of the United States as provided by law.

That on October 3rd, 1905, the principal defendant filed with the Clerk of said Circuit Court of the United States, a motion to quash and set aside service, with an affidavit in support thereof attached thereto, which motion and affidavit have been hereinbefore referred to and the same, avoiding the repeating of the title thereof are herein set out in full, as follows:

(Title.)

Motion to Quash and Set Aside Service.

Now comes the defendant Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and appearing specially for the purpose of this motion only, objects to the jurisdiction of the court over the defendant, and also of its property, and moves to quash and set aside the service of attachment and garnishment attempted to be made in this cause by plaintiff against the defendant's property, and as grounds therefor states:

1st. That this defendant railway company is engaged in the business of owning operating and conducting lines of railway situate in the State of Indiana, Illinois, and Ohio, and incorporated under the laws of the States of Indiana and Ohio, with its principal place of

business in the City of Cincinnati, State of Ohio, and is not a corporation of the State of Iowa, and has no line of road and has no agent or agency of any character in the State of Iowa; that as such railway it is a common carrier of freight, passengers and goods, and in the carrying on of such business, owns and operates cars for the transportation of freight and merchandise through the various States; that in the conduct of its business as such common carrier, it had, at and before the time of the commencement of this suit, and now has, existing arrangements, contracts and agreements with various other connecting railway companies doing business as common carriers, including all of the railway companies attached and garnished in this cause by the plaintiff, and hereinafter named, and under and by which agreements and arrangements said com-
31 panies as common carriers accepted from this defendant company at points on its line of road, its cars loaded with goods and merchandise destined for various points upon the lines of their respective roads, said cars so to be transported through the various States to destination, constituting inter-state shipments of commerce. That said agreements and arrangements further provided that said cars of this defendant so received by the other railway companies should be emptied of the merchandise so contained therein, and that said connecting carriers or other lines should have the right to re-load said defendant's cars with freight and merchandise, and so use the same in returning them to places where received by said connecting lines, but that in all cases said cars of defendant company were to be returned to defendant in the usual and ordinary course of transit, and in all cases as soon as the nature and character of the business would permit, And that under and by reason of said agreements and arrangements so existing between defendant and other common carriers, such carriers had the right to use defendant's cars so in their possession, and under the law and Acts of Congress, this defendant was and is obliged to furnish its cars so loaded, so that merchandise and freight could and can be transported continuously from one State to another without being unloaded; and under the laws aforesaid, said connecting lines and common carriers so receiving defendant's cars, were and are obliged to receive the same and transport from one State to another; that under and by reason of the arrangements, agreements and the law heretofore stated the following railway companies and common carriers, to-wit; Chicago Milwaukee & St. Paul Railway Co., Chicago St. Paul, Minneapolis & Omaha Railway Company, Great Northern Railway Company, Willmer & Sioux Falls Railway Company; Chicago & Northeestern Railway Company; Great Western Railway Company; Union Pacific Railway Company; Chicago Burlington & Quincy Railway Company, Chicago Rock Island & Pacific Railroad Company, and Illinois Central Railroad Company, had in their possession at the time of the
32 commencement of this case, freight cars belonging to the defendant company, all of which cars were so in the possession of the above said railway companies for the purpose of transporting freight and merchandise contained in said cars, as interstate commerce, to the various points of destination of such freight,

and when unloaded to be returned to defendant company in the usual course of such business, and in the manner above stated, and that all of said cars so in the possession of said railway companies in this state, belonging to this defendant, were attempted to be attached by plaintiff on an alleged cause of action in favor of plaintiff and against this defendant, by reason of the alleged wrongful causing of the death of plaintiff's decedent while a passenger on one of defendant's trains in the State of Illinois. And at the time of the commencement of this suit, and at the time of the attempted attachment said cars so attached were engaged in inter-state commerce and were a part of the equipment of defendant company's rolling stock, and said cars were and are necessary to enable defendant company to perform its duties as a common carrier, and to deprive defendant of the use of said cars beyond the time necessary for their return from the garnishee companies, would seriously interfere with defendant's duties as such common carrier; that by reason of the commerce clause of the National Constitution and of the Interstate Commerce Act of Congress, said cars can not be levied upon under writ of attachment in this State, all of which is shown by the affidavit hereto attached, marked Exhibit "A" and made a part hereof; that this defendant has not been served personally or by publication with summons or other process from this or any State Court, and has not appeared to the action of the plaintiff or any writ issued in this cause.

2nd. For the reason that plaintiff has attempted to obtain jurisdiction in this cause by garnishing the railway companies and common carriers specifically mentioned in the first ground of this
33 motion. No jurisdiction can be obtained by such garnishment because defendant is a foreign corporation with no office, and with no agent or agency in the State of Iowa, and said garnishees are all non-residents of Iowa and are foreign corporations, and said companies have no property, money or other thing in their possession belonging to defendant except freight cars engaged in interstate commerce, under the arrangements agreements and law existing as set out in detail in the first ground of this motion, which so far as applicable, is hereby referred to and made a part of this ground of the motion without repetition.

And for the further reason that there was no personal service upon the defendant in this state, nor any actual seizure of the cars so in the possesion of said garnishees under said writ of garnishment and the defendant has not appeared to this action or any writ issued herein. That said garnishees are not indebted to this defendant in any sum on any account whatsoever, and said garnishees have so answered in this cause. That all of the accounts that might be due this defendant from said garnishees are solely and only by reason of the contract and agreements heretofore stated existing between defendant and said garnishees for the use of said cars. That under said agreements and arrangements this defendant uses the cars of the garnishees herein, and payment for the use of said cars is arranged between the companies by wheelage or mileage of such cars, and is constantly and hourly changing from balance due one company, to balance due the other company which balances are satisfied and set-

tled by such exchange of service and use of each other's cars. And such agreements and contracts are to be discharged, satisfied and settled only in the City of Chicago and State of Illinois, where the same are made, and such accounts, or debts if any, in favor of this defendant, have no situs in the State of Iowa, All of which is shown by the affidavit hereto attached marked Exhibit "A" and made a part hereof.

SHULL & FARNSWORTH,
Att'ys for Def't.

34 EXHIBIT "A."

(Title.)

Affidavit.

STATE OF IOWA, *County of Hamilton, ss:*

E. P. Higgins being duly sworn according to law, deposes and says:

That he is Auditor of Disbursements of the defendant company; that he has read the motion of the defendant company filed in this cause, and to which this affidavit is attached as Exhibit "A" and that the statements of fact contained in said motion, and each ground thereof, are true as he verily believes.

That the defendant company is a railway corporation, and as such is a common carrier of freight and passengers, engaged in interstate commerce; that it is incorporated and existing under the laws of the States of Indiana and Ohio, with its principal place of business in the City of Cincinnati in said State of Ohio; that it has no line of railway in the State of Iowa, and does not operate any line of railway therein, and has no agent or agency in said State, and does not transact any business in said State of any character whatsoever and has no property therein, except that some of its cars are from time to time in the possession of other and connecting common carriers in the discharge of their duties as such in such States, and in transporting freight through the various states.

That this defendant has traffic arrangements and agreements with the following railway companies: Chicago Milwaukee & St. Paul Railway Company; Chicago, St. Paul, Minneapolis, & Omaha Railway Company; Great Northern Railway Company; Willmar & Sioux Falls Railway Company; Chicago & Northwestern Railway Company; Great Western Railway Company; Union Pacific Railway Company; Chicago Burlington & Quincy Railroad Com-
35 pany; Chicago Rock Island & Pacific Railroad Company, and Illinois Central Railway Company, by and under which said companies receive from defendant and its connections, defendant's loaded freight cars for transportation to the various points to which the freight therein may be destined, under which agreements said cars may be used by said companies for the hauling of freight, in returning from such points to defendant's line of railway,

and that all of said cars so received by said companies are to be returned as soon as practicable in the usual course of such business, and that none of said companies so named herein had at the time nor since the commencement of this action, any of defendant's cars or property, except such as were engaged in interstate commerce, and under the terms of said agreements and arrangements herein referred to, and under the law governing common carriers engaged in interstate commerce.

That the agreements and arrangements so made with said companies were made and entered into in the City of Chicago State of Illinois, and that any moneys payable to this defendant by said companies by reason thereof are payable in said City of Chicago, and at no other place.

That no officer or agent of defendant company was served with any process in this case in the State of Iowa.

E. P. HIGGINS.

Subscribed and sworn to by E. P. Higgins, before me this 29th day of September 1905.

[SEAL.] JOSEPH MOSES,
Notary Public, Hamilton Co., O.

My commission expires on the 30 day of January 1907.

36 That thereafter and within the time fixed by the Court, to-wit on October 13th, A. D. 1905, the plaintiff filed a resistance to defendant's appearance and motion to quash, and set aside service of notice of attachment and garnishment, with an affidavit attached thereto in support thereof, which resistance and affidavit have been hereinbefore referred to, and which, avoiding the repeating of the title, are here set out in full as follows:

(Title.)

Resistance of Plaintiff to Defendant's Alleged Special Appearance and Motion to Quash and Set Aside Service of Writs of Attachment and Garnishment.

Comes now the plaintiff Charles A. Davis, executor of the estate of Frank E. Jandt, deceased, and files his resistance to defendant's alleged special appearance and motion to quash and set aside service of writ of attachment and garnishment herein, and shows to the Court the following grounds:

First. That the defendant's alleged special appearance for the purpose set forth in said motion is unwarranted, and unauthorized by law, in that the relief asked by the defendant, questions in the same motion, the jurisdiction of the Court over the person of the defendant and also, the jurisdiction of the Court over the property, which the record shows consists of certain cars which have actually been attached and are now in the possession of the Sheriffs attaching them; and also questions the jurisdiction of the Court over the property and money of the defendant in the hands of other railroad com-

panies shown by the record as garnishee companies and that such proceedings as are sought by the defendant's alleged motion to set aside service, can only be had by a general appearance, and that the defendant's appearances for all of said purposes, must, therefor, be construed by the court to be a general appearance, such as
37 subjects the person of the defendant as well as the property actually attached, and the property and money of the defendant sought to be reached by garnishment proceedings to the jurisdiction of this Court.

Second. That the defendant's alleged special appearance is not alone to object to the jurisdiction of the Court over the person of the defendant, but, in addition to objecting to the jurisdiction of the court over the person of the defendant, the defendant by its motion, undertakes to object to the jurisdiction of the court over the property of the defendant actually attached, and to the jurisdiction of the Court over the money and property of the defendant sought to be subjected and actually subjected to the jurisdiction of the court by garnishment proceedings; that is, the defendant, by its alleged special appearance, undertakes to object (1) to the jurisdiction of the court over the person of the defendant, and (2) in the same motion, to the jurisdiction of the court over the *res* of the action. That the defendant, therefore, by filing said motion to quash and supporting it by affidavit, or evidence other than the records in the case, has made a general appearance, by which it has subjected, not only the person of the defendant but the rest of the action to the jurisdiction of the court.

Third. That the defendant's alleged special appearance is for the purpose of quashing or dissolving the writ of attachment and the garnishment proceedings in connection therewith, for reasons not apparent of record, and on account of the alleged immunity of the property attached from process. That the motion of the defendant to quash and set aside service is supported by affidavit, and is not for the purpose of raising any question of lack of, or defect in the process itself.

Fourth. That the defendant's alleged special appearance is not for the purpose of raising any question of lack of notice, or de-
38 fect, notice of defect, or irregularity in the process, but to contest the right to attach property by evidence outside the record of the case, and require the court to pass upon the merits of the attachment.

Fifth. That the defendant in its alleged motion to quash and set aside service, states: "That this defendant has not been served personally or by publication with summons or other process from this or any other state court, and has not appeared, to the action of the plaintiff or in any writ issued in this cause": which statement the plaintiff in this, his resistance of said motion, denies, and, in support of his denial calls special attention to that part of the transcript filed herein, showing the original notice in this case and the proof of service of the same upon the defendant, found on pages 123, 124, and 125 of the transcript of this case filed in this court.

Sixth. That the property attached, as shown by the transcript

in this case, which transcript is here referred to and made a part hereof, consists of various freight cars belonging to the defendant company which were not engaged in inter-state commerce or in the transportation of inter state commerce at the time they were attached, but with the exception of the car attached in the possession of the Great Western Railway Company, all of said cars thus attached were not in use at the time they were attached, but were standing empty and idle upon the tracks of the railway companies in whose possession they were found; that they were not in actual use, and were not in transit to any point either within the state or outside the state;

Seventh. That the principal defendant, as shown by the pleading of the plaintiff controverting the answers of the several garnishees, which pleadings are sworn to, and which are here specifically referred to and made a part hereof, and as shown by the affidavit hereto attached marked Exhibit "One" and made a part hereof, at the time of the attachments and the service of the writs and notices of garnishment, had no existing arrangements, contracts or agree-
39 ments with the various railway companies named in defendant's motion to quash and set aside the service, in whose possession the cars attached were found giving said companies the right to reload the same with freight for inter-state commerce, and that no obligation rested upon said railway companies in whose possession said cars were found to reload the same, and that said railway companies owed no duty to said defendant in reference to said cars other than to deliver the same to the defendant company. That the question of the existence or lack of existence of said contractual arrangements having been put in issue by the answers of the garnishees and the pleadings of the plaintiff controverting the same, and all under oath, and no such contracts having as yet been produced, the plaintiff would be entitled, if the same exist to have them filed for inspection and produced on the hearing of the defendant's alleged motion to quash and set aside service of attachment and garnishment.

Eighth. That this court on the record as it exists, has no jurisdiction to try and determine the merits of the questions involved in the attachment and garnishment proceedings, between the plaintiff and the garnishee defendants. That the principal defendant by the filing of its motion, supported by affidavit outside of the record contained in the transcript filed herein, and raising the question sought to be raised by said motion, has made a general appearance, and subjected the person and property of the principal defendant to the jurisdiction of this court.

Ninth. That the alleged right set up by the principal defendant by which it claims the other railroad companies named in its motion to quash, have the right to use the cars which have actually been attached is simply a license or privilege not resting upon contract, but depending upon custom, which custom of returning cars loaded or unloaded to the principal defendant depends upon the convenience of the other companies, and that no contractural relations exists between the principal defendant and said other railway companies in reference thereto.

40 Tenth. That said cars so attached, and in the possession of other railway companies, belonged to the defendant, and were not necessary or indispensable to enable the principal defendant or the other companies named to perform their duties as common carriers, and were at the time of the attachment and are now, subject to attachment as other personal property and are, as shown by the transcript of the record filed herein which is here referred to and made a part hereof, still in the possession of the sheriffs who made such attachment.

Eleventh. That the railway companies in whose possession said cars were found when attached, and upon whom the writ of garnishment has been properly served, had no interest in the attached cars; that none of said companies have served notice of interest or ownership upon this plaintiff, nor upon the sheriffs who attached said cars; that said companies had not put said cars in use at the time the same were attached, and were contemplating the return of the same empty to the defendant and within a reasonable time.

Twelfth. That there is no provisions of law requiring the defendant, nor the garnishee companies, nor any common carrier, to deliver to or receive from connecting carriers and transport freight in the original cars in which the same was loaded.

That in support of each ground of this, the plaintiff's resistance to the principal defendant's motion to quash and set aside service of the writs of attachment and garnishment, the plaintiff refers to the transcript of the record filed in this case, and makes the same a part hereof and further refers to the affidavit hereto attached, marked Exhibit "One" and made a part hereof.

T. F. BEVINGTON,
WILBUR OWEN,
Attorneys for Plaintiff.

41 EXHIBIT ONE.

(Title.)

Affidavit.

STATE OF IOWA, *Woodbury County:*

I, Wilbur Owen, being duly sworn, on oath depose and say:

That I am one of the attorneys for the plaintiff in the above entitled cause, that I was personally present at the time the cars belonging to the defendant were attached by the sherrif- in this action, and that with the exception of the car upon the tracks of the Chicago and Great Western Railway Company, at Council Bluffs, Iowa, the same were empty and not in use, and were standing upon the tracks of the various railroad companies at the time the same were attached; that the said cars had arrived at their destination and had been unloaded by the consignee. That affiant made inquiry of the superintendents, officers and agents of each of said companies in reference to whether or not any contractural relations existed between the said companies and the principal defendant compa-y, in reference to

loading and sending said cars back to the principal defendant. That by this inquiry the affiant learned from said superintendents, officers and agents in charge of the cars attached, that no contractural relations existed. That affiant further learned from said superintendents, officers and agents that it was not the intention of the companies in whose possession said cars were found, to load and return them, but it was the intention of said companies to send them back empty when convenient, unless some special arrangement was made by the principal defendant to have them loaded; and, affiant further learned that no special arrangements had been made by which any of the cars attached in this proceeding were to be reloaded before the same were to be re-delivered to the principal defendant.

That affiant in addition to the foregoing, states that he has read and is acquainted with the statements made in plaintiff's
42 resistance to the defendant's motion to quash and set aside service of the writs of attachment and garnishment in this case, and that the statements contained in said resistance, and each ground thereof, and in this affidavit, are true as affiant verily believes.

WILBUR OWEN.

Subscribed in my presence and sworn to before me by said Wilbur Owen, this 13th day of October 1905.

[SEAL.] T. F. BEVINGTON,
Notary Public.

That the attorneys for the plaintiff on May 5th, 1906, caused to be filed with the Clerk of said Circuit Court of the United Statese, a written trial notice, which, avoiding the repeating of the title is as follows.

(Title.)

Trial Notice.

417. Law.

The Clerk will please notice the above entitled cause for trial at the May Term beginning on May 22, 1906.

T. F. BEVINGTON,
WILBUR OWEN,
Att'ys for Plaintiff.

That upon the record and issues thus joined, and the affidavits of the respective parties in support and resistance thereof, all as above set out, the matters determined and complained of were submitted to the Court, without other evidence or offer thereof by either party, at the October 1905 term of said Court, and by the Court taken under advisement.

That on May 22nd, A. D. 1906, at the time of the convening of the May 1906 Term of said Circuit Court of the United States, the Hon. Henry T. Reed, presiding, rendered an opinion on the matters

in issue, and on the issues joined by the principal defendant's
43 motion to quash and set aside service, and the plaintiff's resistance thereto, which opinion was afterwards filed with the Clerk of the Circuit Court of the United States and made a part of the record in said cause, and is as follows, without here repeating the title thereof.

On Motion to Quash Attachment and Service of Process.

The plaintiff a citizen of Iowa as administrator of the estate of Frank E. Jandt, deceased, filed in the district court of Iowa in and for Woodbury County, a petition against the defendant railway company asking judgment against it in the sum of $10,000 for the alleged wrongful and negligent killing of the deceased in the State of Illinois, while a passenger on one of its trains in that state. An order was allowed by a judge of that court authorizing the attachment of property of the defendant company not exceeding $15,000 in value. Thereupon writs of attachment were issued to the sheriffs of Woodbury and Pottawattamie Counties, in the state of Iowa, and thereunder 22 freight cars of the defendant railroad company, while in the possession of nine other railroad companies, who had severally brought one or more of such cars into the State of Iowa, were attached by said sheriff in Pottawattamie and Woodbury counties; and said railroad companies were also attached as garnishees of the defendant company and required to appear and answer in said district court of Woodbury county. The defendant was not served in the state of Iowa with notice of the filing of said petition, the commencement of said action, or of any of the proceedings under said writs of attachment, but was served with such notices at its office and principal place of business in Cincinnati, Ohio.

The defendant appeared specially in the state court for the purpose of removing said cause to this court, and in due time did so remove the same on the grounds of the diverse citizenship of the plaintiff and the defendant. The record has been filed in this court and the defendant appears specially and moves to set aside the service
44 of the *the* notices upon it and to quash the writs of attachment and the proceedings thereunder upon the ground that the state court by the proceedings therein acquired no jurisdiction of the defendant or of its property, and that this court has none for the reason that the defendant is and was when the proceedings were commenced a corporation created and existing under the laws of Ohio and Indiana, and not under the law of Iowa; that it does not and did not know or operate any railroad in Iowa, did no business in that State and had no officer or agent in said state upon whom process could be served and that none was served upon it in said state of Iowa; that the cars attempted to be seized under said writs of attachment and garnishee process were loaded with property upon defendant's line of railroad outside of the state of Iowa, to be carried without change of cars to points within that and other states, and were delivered by the defendant outside the state of Iowa to the several garnishee companies, which are connecting carriers with the defendant, pursuant to agreement with each of them for the formation of

continuous lines of railroad for the transportation of property from one state to and through others over their respective roads, pursuant to the Acts of Congress so authorizing; that the cars in question were brought into the state of Iowa by said several garnishees pursuant to such agreement, for the purpose only of completing an interstate shipment of the property with which they were loaded, and when emptied were to be returned to the defendant company in the state of its incorporation, or where the cars were delivered to said garnishees as soon as it could reasonably be done; that said several garnishees, under the agreements between them the defendant and each other, had the right to use the cars of this defendant in the transportation of property in the regular course of business while returning said cars; in other words that said cars at the time of their attachment were being used by the defendant and its connecting carriers, the said several garnishees, in interstate commerce. That
45 all of the *the* indebtedness if any, that might be due the defendant from said several garnishees, is solely and only by reason of the contracts and agreements heretofore stated, and that such agreements and contracts are to be discharged, satisfied and settled only in the city of Chicago state of Illinois, where the same were made, and that such accounts or debts, if any, in favor of this defendant have no *situs* in the state of Iowa, and are not subject to attachment in that state. The motion is supported by the affidavit of an officer of the defendant, which sets forth in detail the facts above stated.

Each of said garnishees severally answered under oath in the state court, admitting that it had cars of the defendant in its possession, but alleged that said cars were delivered to it by the defendant at points outside the state of Iowa loaded with freight consigned to points within that or other states, and were brought into that state by it in the regular course of its business in the transportation of property between the states; that said cars were so received by it from the defendant pursuant to an agreement between it and the defendant company for the purpose of forming continuous lines of railway for the transportation of property between different states and for the interchange of cars and traffic between them substantially as alleged in the motion of defendant to quash the attachment and to release said cars and the several garnishees therefrom. Some of the garnishees deny being indebted to the defendant in any sum; and others allege that if any indebtedness is due to the defendant from them it is on account of the interchange of traffic between them and defendant as alleged which account was constantly changing from amounts due defendant to amounts due from it to the garnishee, and that if upon a settlement thereof anything was found to be due to defendant it was so due in Chicago where the agreement was made, or at the principal place of business of the defendant in Cincinnati, Ohio, and not in the State of Iowa. The rail-
46 roads of the defendant and the several garnishees are operated by steam, and each of the garnishees except one, is a foreign corporation, and all operate their roads in Iowa and other states and have agents in Iowa upon whom process may be served as provided by Sec. 3529, Code of Iowa, 1897.

The plaintiff filed in the state court a pleading as authorized by the statute of Iowa but not under oath, taking issue upon the answers of the several garnishees, and in such pleading denies generally the answers of said garnishees except as admitted or otherwise answered by said pleading. It is admitted that said cars were delivered to the several garnishees companies for the purpose of completing an interstate shipment of the property with which they were loaded; but it is not alleged that either of the garnishee companies has in its possession or under its control any property of the defendant other than said cars, or that either is indebted to the defendant in any sum other than for its proportionate share of the compensation for the carriage of said property from the point of shipment to its destination, which the garnishees may have collected at said destination as the terminal or final carriers of such inter state shipment. It is also alleged that some of the cars at the time that they were attached were empty.

The plaintiff resists the motion to quash the writs of attachment and proceedings thereunder, upon the grounds:

1st. That the state court rightly acquired jurisdiction of the defendant's cars because they were within the state of Iowa at the time of their attachment, and

2nd. That the defendant has appeared in this court, and moved to quash the attachment proceedings, and has thereby waived its special appearance and submitted itself and its attached property to the jurisdiction of this Court.

No evidence is submitted by the plaintiff in opposition to the motion of defendant to quash the attachment, or in support of its pleading controverting the answer of the several garnishees,
47 and the matters are submitted upon the record, including such motion and admission of the pleadings;

Wilbur Owen, Thos. F. Bevington, for the plaintiff.

Shull & Farnsworth, for the defendant.

Wright & Call, J. C. Davis, and Clark & McLaughlin; W. S. Kenyon, and Henderson & Fribourg, J. W. Hallam, W. A. Kelly, and John A. Baldwin, for the several garnishees.

REED, *District Judge:*

The removal of the case by the defendant from the state court, even if its appearance in that court had not been limited to such purpose, does not preclude it from challenging in this court the jurisdiction of the state court or of this court of its person, or from claiming exemption from being sued in a state other than that of its residence.

Wabash Western Railway Co. *vs.* Brow, 164 U. S. 271.
Murray *vs.* Wilcox, 122 Iowa, 188.

The contention of the plaintiff is, that the defendant by moving to quash the attachment, though appearing specially for that purpose thereby invoked the judgment of the court upon a question other than that of its jurisdiction of the person of the defendant, and that by so doing it has appeared generally to the action. The

question of the jurisdiction or right of a court to attach property at all, and that of its right to determine what disposition
48 shall be made of the property that it has the right to and has in fact attached are quite distinct. In the one case the court can only determine its jurisdiction or right to attach the property, and if it has not such right then to order its release in case it has been attached; but if it has the right to attach the same and has in fact done so, then it may and must determine the rights of claimants thereto if any are presented. The motion of the defendant to quash the attachment presents the former of the above questions and challenges the jurisdiction of the court to attach its cars upon the ground that they were, when attached, an instrumentality used by it and its connecting carriers in interstate commerce, and it limits its appearance specially for such purpose. Does the defendant by invoking the judgment of the court upon such question, waive its special appearance to thus challenge the jurisdiction of the court and thereby appear generally to the action?

Sec. 3541 (3) Code of Iowa, 1897, is relied upon as supporting the contention of the plaintiff; that section provides, "That an appearance by the defendant * * * for any purpose connected with the case renders any further notice unnecessary."

In Chittenden *vs.* Hobbs, 9 Iowa 417, it is held under this statute that an appearance by the defendant to quash an attachment was a general appearance to the action and rendered notice of the suit unnecessary; but it is plainly indicated in the opinion of the court that if the appearance had been special for the purpose of objecting to the jurisdiction of the court, it would not have had the effect that was given it. If an appearance to object to the jurisdiction of the court over the person or property of the defendant has the effect of conferring such jurisdiction, then a defendant is effectually precluded from ever presenting such question for determination, for his appearance to do so would defeat the very purpose for which he appears and confer the jurisdiction. Such could not have been the purpose of the statute. This section is the same as Sec. 2840
49 (3) of the Revision of 1860, and from the note to that section it appears that its purpose was to prevent appearances for the purpose of objections to the substance or manner of the service. But this is quite different from an appearance to object to the jurisdiction of the court.

Spurrier *vs.* Wirtner, 48 Iowa 486.
Cibula *vs.* Pitts Co. 48, Iowa, 528.

In Murray *vs.* Wilcox, 122 Iowa 188, it is held that this provision of the statute has no reference to an appearance though general, by a non-resident defendant to claim that he was exempt from service at the time process was served upon him in this state. The court says, "In enacting this statute and in authorizing suit against a non-resident in any county of the state where found, the legislature had no thought of interfering with a rule concerning exemption from service of notice."

See also

Wilson *vs.* Donaldson, 117 Ind. 356, and cases cited, and Atchinson *vs.* Morris, 11 Fed. Rep. 582-585.

In Harkness *vs.* Hyde, 98 U. S. 476-479 it is said:

"Illegality in a proceeding by which jurisdiction is to be obtained is no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity. Nor is the objection waived when being urged it is overruled and the defendant is thereby compelled to answer. * * * It is only when he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

Railway Co. *vs.* Denton, 146 U. S. 206.

In Goldey *vs.* Morning News, 156 U. S. 518-523, it is said:

"The removal of a suit into the circuit court of the United States does not admit that it was rightly pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the circuit court of the United States of any and every defense duly and seasonably reserved and pleaded to the action, in the same manner, as if it had
50 been originally commenced in said circuit court."

And in Railway Co. *vs.* Brow, 164 U. S. 271-278, it is said:

"We regard it as not open to doubt that the party has a right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of congress to hold that a party who has the right to remove a cause, is foreclosed as to any question upon which the federal court can be called upon under the law to decide.

Construction Co. *vs.* Fitzgerald, 137 U. S. 98, is clearly distinguishable from the above cases, for in that case the defendant appeared generally to the action and proceeded into the third day of the trial before raising the question of the jurisdiction of the court over the person, and its jurisdiction over the attached property was at no time challenged. Held that by such appearance and participation in the trial the defendant waived all questions of service of process and converted into a personal suit that which before was but a proceeding *in rem*. The defendant appeared specially in the state court for the purpose of removing the cause to this court, and in this court limits its appearance to the purpose of showing that the state court acquired no jurisdiction of its persons by the service of process upon it in the state of Ohio, and that its property attached under the process of the state court was not subject to such attachment. Such appearance under the authorities above cited is not a general appearance to the action.

The remaining question is,—Was the property of the defendant subject to attachment by the state court?

Sec. 3876 Code of Iowa 1897 provides: "That the plaintiff in a civil action may cause the property of the defendant not exempt from execution to the attached at the commencement of or during the progress of the proceeding. * * *."

Sec. 2877. "* * * And in all cases the proceedings
51 relative to the attachment are to be deemed independent of the ordinary proceedings, and only auxiliary thereto."

SEC. 3929. "A motion may be made to discharge the attachment or any part thereof at any time before trial * * * for any cause making it apparent of record that the attachment * * * should not have been levied upon all or on some of the property held."

Under this last named section it is held by the supreme court of Iowa that it may be made "apparent of record that the attachment should not have been levied upon all or some of the property" by affidavits in support of the motion to discharge.

Wilson *vs.* Stripe, 4 G. Gr. 551.
Hastings *vs.* Phœnix, 59 Iowa, 394.
Cox *vs.* Allen, 91 Iowa, 462.

It very clearly appears from the affidavit in support of the motion to quash the attachment, that at the time the cars of defendant were delivered to the several garnishees, there were existing agreements between the defendant and said garnishees for the continuous carriage of freight from one state to and through other states to its destination on their said lines of road; that said cars were severally loaded with freight at places on defendant's road outside of the state of Iowa, consigned to places on the lines of the respective garnishees in Iowa and Nebraska, and were delivered by defendant outside the state of Iowa to said several garnishees pursuant to said agreement to be carried by them to the destination of said freight, there to be unloaded, and as soon as it could reasonably be done, returned to defendant either empty or reloaded with freight to be carried in the usual course of their business in returning said cars. Are cars while being so used subject to seizure under the general attachment laws of the state to or through which they are thus carried?

Sec. 5258 Rev. Stat. U. S. is as follows:

"Whereas the constitution of the United States confers
52 upon congress in express terms, the power to regulate commerce among the several states, and to establish post roads, * * * Therefore,

Be it Enacted that every railroad company in the United States whose road is operated by steam * * * is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers * * * mails, freight and property on their way from any state to another state, and to receive compensation therefor; and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination * * *" (14 Stat. p. 60).

It is said that this act is permissive only and does not impose any obligations upon carriers of the class described to enter into such agreement; or if such agreements are made does not relieve them from any liability to which they would otherwise be subject. But the question is; are the cars or other instrumentalities of the companies forming such continuous lines when used in interstate traffic so used pursuant to the authority of congress? If they are then

such use cannot be rightly burdened or interfered with by or under the authority of state legislation.

Brown *vs.* Maryland, 12 Wheat 419.
McCulloch *vs.* Maryland, 4 Wheat 316.
Prigg *vs.* Pennsylvania, 16 Pet. 439.
Leisy *vs.* Hardin, 135 U. S. 100.
Bowman *vs.* Railway Co., 125 U. S. 465.
Easton *vs.* Iowa, 188 U. S. 220.

The plain purpose of Sec. 5258 is an exercise by congress of the power conferred upon it by the commerce clause of the federal constitution; and this it does by permitting the owners of connecting lines of steam railroads to arrange for the formation of continuous lines for the transportation of persons and property over their respective roads from one state to and through others without change of cars, and to receive compensation therefor.

In Railroad Co. *vs.* Richmond, 19 Wall 584 this section and the act of July 25th, 1866, authorizing the construction of
53 bridges, over navigable rivers, were under consideration. The court said in reference thereto: "These acts were passed under the power vested in Congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were also intended to reach trammels interposed by state enactments or by existing laws of Congress."

In Bowman *vs.* Railroad Company 125 U. S. 465, 485 the court in referring to the same sections says;

"So far as these regulations made by congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by the states in particular cases by the express permission of congress. * * * The subjects upon which congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting alike all the states; others are local. Of the former class may be mentioned all that portion of commerce * * * between the states which consists in the transportation purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that congress can alone prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity *or by that means of transportation* shall be free * * * Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms * * * *the transportation and transit of persons and property*, as
54 well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined, there can only

be one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system."

By the Act of Congress of February 4th, 1887, the act to regulate commerce it is provided, that the provision of this act shall apply to any common carrier or carriers engaged in the transportation of persons and property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management *or arrangement* for a continuous carriage or shipment from one state or territory of the United States, to another state or territory, shall be subject to the provisions of this act; and it shall be unlawful for any such carrier to enter into any, * * * agreement express or implied to prevent, by change of time schedules, carriage in different cars, or by any other means or device the carriage of freight from being continuous from the place of shipment to its destination; and the term "transportation" shall include all instrumentalities of shipment or carriage (24. St. 379, ch. 104.)

This law was enacted to further regulate that part of commerce which consists in the transportation of property, by means of railway and water lines between the states, and to subjects carriers engaged in such transportation to the provision of the act.

That the states may not burden instrumentalities of interstate commerce has been frequently determined by the Supreme Court of the United States. The exact limit of lawful legislation by states upon this subject cannot be definitely defined. It can only be illustrated from decided cases, and from the principles announced in them it will be determined in the particular case under investigation whether or not the legislation of the state under consideration when carried into effect imposes any burdens or restrictions upon interstate commerce that may directly interfere therewith.

55 Wabash Railway Co., *vs.* Illinois 118 U. S. 557-571.

In the recent case of the Central Railroad Company *vs.* Murphy 196 U. S. 194, it was held that the imposition by a state statute upon the initial or any connecting carrier of the duty of tracing freight and informing the shipper in writing, in case of its injury or loss who, where, how, and by which carrier the freight was lost, damaged, or destroyed, and giving the names of the parties, and their official position, if any, by whom the truth of the facts set out in the information could be established is, when applied to interstate commerce, a violation of the commerce clause of the federal constitution and void.

In Railroad *vs.* Illinois, 177 U. S. 514, it was held that the statute of a state requiring express trains intended only for through passengers to stop at every county seat, in the state through which they run, when ample accommodations were provided by local trains, was held to be an unreasonable burden upon interstate commerce and void.

In Telegraph Co. *vs.* Pendelton, 122 U. S. 347, a state law requiring telegraph messages to be delivered within one mile of the station is held to be void as to messages between the states. Many other

cases might be cited, to do so would unnecessarily extend this opinion.

The burden imposed by such legislation is slight as compared with that which would authorize the seizure upon attachment of an entire train of cars or of any part thereof, carrying freight from one state to or through another. When the defendant and its connecting carriers, the several garnishees entered into the agreements shown by this record, they became subject to the acts of congress regulating commerce, and it would have been unlawful for any of them to have refused to accept the cars of others loaded with freight destined to points on their respective lines and carry the same to their destination and in case of such refusal they might have been compelled by mandatory injunction to perform the public duties imposed upon them by these acts of congress.

Act of March 2, 1889 Sec. 10 ch. 382 24 St. 862.

56 Union Pacific Co., *vs.* Hall 91 U. S. 343.

C. B. & Q. Ry. Co., — Railway Co., 34 Fed. Rep. 481.

In re Lennon 166 U. S. 548.

Toledo & A. Ry. Co., *vs.* Pennsylvania Co. 54 Fed. Rep. 730-746.

The formation of continuous lines of transportation whereby each road instead of remaining a separate line becomes a part of a great railway system extending into all parts of the country, upon any part of which cars may be loaded with freight to be transported without unloading, to its destination on any part of the system, is authorized by Congress. This greatly subserves the public convenience lessens the cost of transportation and delays in carriage; and to authorize cars while being so used to be seized upon attachment under authority of state laws at the suit of an individual would greatly inconvenience the public directly interfere with interstate commerce and with the authority of congress in providing for such continuous lines of transportation.

That cars so used are not subject to attachment or garnishment under the general attachment laws of a state into which they are carried is held upon full and careful consideration in Wall *vs.* Norfolk & Western Ry. Co., 52 W. Va. 485, (44 S. E. Rep. 294); Connery *vs.* Railway Co., 92 Minn. 20 (99 N. W. Rep. 365) and Mich. C. Ry. Co., *vs.* M. & Lake Shore Ry. Co., 1 Ill. App. 399, for the reasons among others that such attachment would be against public policy, and a direct interference with interstate commerce, and the acts of congress regulating the same.

See also

Montrose Pickle Co., *vs.* Dodson 76 Iowa 172.

Bates *vs.* Railway Co. 60 Wis. 296 (19 N. W. Rep. 72)

The execution of attachment laws of the several states doubtless were not primarily intended as burdens upon or as an int-ference with interstate commerce. But if the instrumentalities of such commerce when being lawfully used therein may be seized and held under such laws, then when enforced they would in fact be a most

serious burden upon or interference with that commerce, and
57 to the extent that they so authorize they are just as obnoxious as if that had been their primary purpose. The validity of a law of the state so far as it relates to or may operate upon matters within the exclusive control of congress, is determined by its effect upon such matters when enforced, and not by the purpose for which it may have been enacted.

Crutcher *vs.* Kentucky 141 U. S. 47-59.
Easton *vs.* Iowa 188 U. S. 220-231, 238.

It is further urged that some of the cars were when attached empty, and had not started on the return trip, and were not therefore then engaged in interstate transportation. In Johnson *vs.* Southern Pac. Ry. Co., 196 U. S. 1-21, a like contention was made as to a dining car which was regularly used to furnish meals to passengers between San Francisco and Ogden. The car was waiting at a point near Ogden for a train to carry it back to San Francisco. It was contended that until the car had actually started upon the return trip it was not used in interstate traffic within the meaning of the safety coupling act of congress. The Supreme Court said of this contention "Counsel urge that the character of the car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement or being put into a train for such purpose, * * * confessedly this car was under the control of congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of the interstate traffic and so within the law."

The cars of defendant when brought into the state of Iowa to complete an interstate shipment of property were being used in interstate commerce, and were being so used while waiting at least a reasonable time to be loaded for the return trip.

Finally it is urged that the debt if any, owing by the several garnishees to the defendant for its share of the price of the
58 carriage which may have been collected by them as the terminal carriers of the shipment, are subject to garnishment under the Iowa code. Sec. 3897 of that code provides, "that property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment * * *."

Sec. 3935. "The mode of such attachment is by serving upon the garnishee a notice in the manner required for the service of original notice, that he must not pay any debt owing by him to the defendant etc." Of course it is only debts that are within the jurisdiction of the state that can be thus attached. Whether the *situs* of a debt for the purpose of attachment is at the domicile or residence of the garnishee or his creditor, is a question upon which the authorities are not in accord.

In Mooney *vs.* Ry. Co., 60 Iowa 347.

Hamilton etc., Ry. Co., *vs.* Crane, 102, Ill. 249, and in some other states it is held that such debts may be attached wherever legal

process may be served upon the garnishee defendant, through the principal defendant and his creditor both reside in another jurisdiction where the debt was contracted and is payable.

The contrary is held in

Central Trust Co., *vs.* Ry. Co., 68 Fed. Rep. 685.
Nye *vs.* Liscombe, 21 Pick. 263.
Gold *vs.* Ry. Co., 1 Gray 424.
Wright *vs.* Ry. Co., 19 Neb. 175.
Singer *vs.* Fleming, 39 Neb. 679-686.
Drake *vs.* Ry. Co., 69 Mich. 168.
Railway Co. *vs.* Smith (Miss.) 19 L. R. A. 577, and note.

It is not necessary to determine this question in this case, for the defendant's share of the compensation for the carriage of the freight in question is as much a part of interstate commerce within the meaning of the acts of congress regulating commerce, and as defined by the Supreme Court, as the actual carriage of the property.

59 If a debt due to a non-resident carrier for such transportation when collected by the terminal or final carrier, may be thus attached in any state where the cars may go to complete an interstate shipment of property, then the owner of such cars will be compelled to follow them into such state to there litigate with whomever may be authorized to attach such debt. If this is permissible, owners of cars could not safely permit them to go beyond their own lines; nor could connecting carriers receive them or collect the cost of the entire shipment without being drawn into litigation in which they have no interest, and be subjected to much inconvenience and expense because thereof. The effect of such proceedings upon interstate transportation is apparent.

The conclusion therefore, is, that the cars of the defendant company, and the debt, if any, owing it by the several garnishees for its share of the carriage of the inter-state shipment in question, were not subject to attachment in Iowa, and that such attachment, and the several garnishees should be discharged, and it is so ordered."

That on said 22nd day of May A. D. 1906, the court rendered judgment dissolving the attachment, discharging the attached property, and dismissing the cause of action as to each of the garnishees, the complete record entry of which, with the plaintiff's exceptions thereto, is as follows. (Without here repeating the title.)

(Title.)

No. 417, Law.

And now to-wit May 22nd A. D. 1906, the motion by defendant to quash the attachment and discharge garnishees thereunder, having been submitted heretofore to the Court, and taken under advisement, and the Court now being fully advised in the premises, finds, and so orders, that said motion should be sustained; to which ruling of the Court plaintiff at the time duly excepts.

60 That on June 6th, A. D. 1906, at said regular May 1906 term of said Circuit Court of the United States, the Court rendered further judgment dismissing the said cause of action as to said principal defendant, on the ground that the Court had no jurisdiction of the defendant or the attached property of the defendant, and taxed the costs in the case to the plaintiff. That the record entry thereof, with the plaintiff's exceptions hereto, without here repeating the title, is as follows:

(Title.)

No. 417, Law.

And now on this 6th day of June A. D. 1906, this cause coming before the Court on motion of defendant to quash the service of motion upon the defendant, and the Court being duly advised therein finds, that said motion should be sustained, to which ruling plaintiff excepts. And accordingly it is the judgment and order of the Court that this cause of action be, and the same is hereby dismissed without prejudice to plaintiff's further right of action, and that defendant have and recover of and from plaintiff, Charles A. Davis, executor of the estate of Frank E. Jandt, deceased, the costs of this action, taxed at $129.70 and that execution issue therefor, to all of which plaintiff at the time duly excepted.

That afterwards and on the 19th day of July A. D. 1906, upon the application of the plaintife the time was extended by the Court until October 2nd, 1906, for the allowance signing and filing of the bill of exceptions in said case, and in the meantime execution was stayed without bond. A copy of which said order without here repeating the title, is as follows:

61 (Title.)

Order.

No. 417, Law.

Now on this 19th day of July A. D. 1906, the application of the plaintiff herein to have the time extended until October 2nd, 1906 for the allowance, signing and filing of the bill of exceptions herein, came on to be heard and was submitted to the Court, upon consideration whereof.

It is ordered by the Court that the time be and is hereby extended until October 2nd, 1906, for the plaintiff to have allowed, signed and filed herein, his bill of exceptions, and in the meantime execution is stayed without bond.

Now on this 28th day of September A. D. 1906, the same being one of the regular days of the May A. D. 1906 term of said Court, the foregoing transcript of the records, proceedings and papers, containing the entire record of all the cause, including the plaintiff's petition the answers of the garnishees, the defendant's motion to

quash and set aside service and the plaintiff's resistance thereto, and all of the proceedings had thereunder in reference thereto, including the opinion orders and judgment of the Court thereon, and the exceptions of the plaintiff thereto, were submitted to the Court, praying that the same be signed and certified by the Judge and approved by him and made a part of the record in said cause, preparatory to the prosecution of a writ of error from the said Circuit Court of the United States to the Supreme Court of the United States;

And the Court having examined said transcript of the record, papers and proceedings, hereby certifies that the same contains the entire record in said cause, including the plaintiff's petition, the answers of the garnishees, the defendant's motion to quash and set aside service and the plaintiff's resistance thereto, and all of the proceedings had thereunder in reference thereto, including
62 the opinion orders and judgment of the Court thereon, and the exceptions of the plaintiff thereto, and all of the record submitted to the Court upon which the judgment herein was rendered.

On consideration whereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $500. which shall operate as a supersedeas bond.

And in this case, I the undersigned, Judge of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, further hereby certify that in sustaining the motion to quash the attachment and discharging the garnishees, and in dismissing the action as to the principal defendant, and taxing the costs to the plaintiff, the sole question considered and determined by the Court was that the court had no jurisdiction over the person of the defendant or of the property involved, and that the appearance of the principal defendant as shown by the record was a special and not a general appearance, and that the same did not subject said principal defendant and its property to the jurisdiction of the Court.

This Certificate is made conformable to the Act of Congress of March 3, 1891, Chapter 317, and the opinion filed herein is made a part of the record, and will be certified and sent up as a part of the proceeding, together with this certificate.

Dated this 28th day of September A. D. 1906.

HENRY T. REED,
District Judge of the United States for the Northern District of Iowa, Western Division.

(Endorsed:) In the U. S. Circuit Court of Northern District Iowa; Charles A. Davis, Executor of the estate of Frank E. Jandt deceased *vs.* Cleveland, Cincinnati, Chicago & St. Louis, Railway Company, Defendant; Chicago Rock Island & Pacific Ry. Co., *et al.* Garnishee defendants; Bill of Exceptions; Filed October 1st, 1906. A. J. Van Duzee, Clerk.

63 *Petition for Removal.*

In the District Court of Iowa in and for Woodbury County, Iowa.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

Petition for Removal.

The above named defendant, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, appears especially now for the purpose of this removal only, and for no other purpose, reserving unto itself the right to appear specially in the United States Court for the purpose of objecting to the jurisdiction on account of service files its petition and respectively shows to this Court that the above entitled suit is brought by the plaintiff to recover of said defendant the sum of $10,000.00 together with the costs, for damages sustained by reason of the accidental death of plaintiff's decedent on account of alleged negligence of the defendant, as more fully appears upon the face of plaintiff's petition which is hereby referred to and made a part of this petition for removal; that said suit is wholly of a civil nature, that the matter and amount in dispute in said suit exceeds exclusive of interest and costs the sum or value of $2,000.00 that the defendant herein is a foreign corporation and was at the time of the commencement of the said suit and still is a non-resident of the State of Iowa.

That the defendant Cleveland, Cincinnati, Chicago & St. Louis Railway Company was then and is now a corporation duly formed, created and organized under and by virtue of the law of the State of Indiana, and was then and still is a citizen and resident of the State of Indiana having its principal place of business in the

64 City of Indianapolis, Indiana.

That the plaintiff Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, was at the time of the commencement of said suit and is now a citizen and resident of the State of Iowa.

That at the time within which the said defendant is required by the laws of the State of Iowa, the rules and practices of this Court, to answer or plead in said suit, has not yet expired; that the said defendant makes and files herewith a bond in the sum of $500.00 with good and sufficient surety for *their* entering in the Circuit Court of the United States for the Northern District of Iowa, Western Division on the first day of its next session, a copy of the record in this suit and for paying all costs, that may be awarded by the said circuit court, if it shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore said defendant prays this Court to proceed no further herein except to accept this petition and said bond, and to make an order requiring said defendant to enter and file a copy of the

record herein in the said Circuit Court of the United States as provided by law.

SHULL & FARNSWORTH,
Attorneys for Defendant.

STATE OF IOWA, *Woodbury County, ss:*

W. H. Farnsworth, being duly sworn, deposes and says; that he is one of the attorneys for the defendant in the above entitled suit; that he is authorized to make and execute this petition and does so on behalf of said defendant; that he has read the said petition and knows the contents thereof, and that the statements and allegations contained therein are true as he verily believes.

W. H. FARNSWORTH.

Subscribed and sworn to by W. H. Farnsworth before me this 4th day of September, 1905.

[SEAL.] ROBERT H. MUNGER,
65 *Notary Public in and for Woodbury County, Iowa.*

Filed Sept. 6, 1905.

WM. CONNIFF,
Clerk D. C.,
By F. J. TRIPP,
Deputy Clerk.

In the District Court of Iowa in and for Woodbury County.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

Bond.

Know all Men by these presents;

That we Cleveland, Cincinnati, Chicago & St. Louis, Railway Company as principal, and The Title Guarranty & Trust Co., of Scranton, County of —— and State of Pa., as surety are held and firmly bound unto Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased in the penal sum of Five Hundred dollars, lawful money of the United States to be paid to the said plaintiff, his executors, administrators or assigns, for which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 5th day of September, 1905.

Whereas the above entitled suit was brought on or about the 12th day of April, 1905, in the District Court for the County of Woodbury in the State of Iowa by the said plaintiff against the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and is

now pending in said State Court and is removable into the Circuit Court of the United States for the Northern District of Iowa, Western Division, and the said Cleveland, Cincinnati, Chicago &
66 St. Louis Railway Company, has petitioned said State Court for such removal.

Now therefore, if the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, shall enter into said Circuit Court of the United States as provided by law, a copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by said Circuit Court of the United States, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By SHULL & FARNSWORTH, *Its Attorneys.*

Sealed and delivered in presence of
W. H. FARNSWORTH.

THE TITLE GUARRANTY & TRUST CO. OF SCRANTON, PA.,
By H. BADGEROW, *Its Att'y in Fact.*

Filed September 6, 1905.

WM. CONNIFF, *Clerk,*
By F. J. TRIPP, *Deputy.*

67 And on the 1st day of October, 1906, there was filed in the office of the Clerk of said Court in this cause, a Petition for Writ of Error to the Circuit Court of Appeals, together with assignment of errors, which are in words and figures as follows:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. At Law.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff in Error,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as the "BIG FOUR" RAILWAY, Defendant in Error; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RAILWAY CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO GREAT WESTERN RAILWAY COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants in Error.

Petition for Writ of Error.

And now comes Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, plaintiff herein, and says; that on or about the

22nd day of May, A. D. 1906, the said Circuit Court of the United States entered a judgment in the above entitled cause dissolving the attachment, discharging the attached property and dismissing the cause of action as to each of the above named garnishees;

And that on or about the 6th day of June, A. D. 1906, the said Court rendered further judgment dismissing the said cause of action as to the principal defendant on the ground that the Court had no jurisdiction of the defendant or the attached property of the defendant, and taxed the costs in the case to the plaintiff, to both of which judgments the plaintiff at the time duly excepted.

68 That in entering said judgments and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore the plaintiff prays that a writ of error may issue in this behalf out of the Circuit Court of the United States for the correction of errors so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

WILBUR OWEN, AND
THOMAS F. BEVINGTON,
Attorneys for Plaintiff in Error.

(Endorsed:) In the U. S. Circuit Court *Western Division* of Iowa, Western Division; Charles A. Davis, Executor of the Estate of Frank E. Jandt Deceased, Plaintiff in Error; *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company, otherwise known as Big Four Railway Defendant in error; Chicago Rock Island & Pacific Ry. Co. *et al.*, Garnishee defendants in Error. Petition for Writ of Error to U. S. Court of Appeals for Eighth Circuit. Filed October 1, 1906. A. J. Van Duzee, Clerk.

69 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff in Error,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as "BIG FOUR" RAILWAY, Defendant in Error; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO GREAT WESTERN RAILWAY CO., CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants in Error.

Assignments of Error Filed with the Petition for Writ of Error.

Comes now the plaintiff in error, and files the following assignments of error upon which he will rely;

1st. The Court erred in entering the judgment of May 22nd,

A. D. 1906, dissolving the attachment, discharging the attached property and dismissing the case as to each of the garnishees, to which ruling of the court the plaintiff at the time duly excepted, for all of the following reasons;

(1) Because the question of whether or not each of the several cars levied upon under the writs of attachment were, at the time of the attachment, engaged in interstate commerce, is a question of fact upon which, under the issues joined, the plaintiff has a right to submit evidence and have such matters determined, along with the other issues involved in the case, in the regular way.

(2) Because the pleadings and affidavits filed in the case
70 show conclusively that the cars in question, when attached, were not, as a matter of fact engaged in interstate commerce.

(3) Because, even though it is shown that the cars in question had been used as instruments of inter state commerce, or that later they might be used as instruments of inter state commerce, nevertheless under the record, it is conclusively shown that said cars were subject to attachment, that they were actually attached, and at the time said order complained of was made, were, as a matter of fact, subject to seizure the same as the property of any other non-resident.

(4) Because, under the record, including the answers of the garnishees and the pleadings of the plaintiff controverting the same, iss-es were joined between the plaintiff and each of said garnishees in the District Court of the State of Iowa, in and for Woodbury County, upon which the plaintiff was entitled to introduce evidence and have a hearing thereon in the regular way as provided by law, and the rights of the plaintiff as against each of said garnishees, were not in any way raised by the defendant's motion filed in the Circuit Court of the United States.

2nd. The Court erred in the rendering of the judgment of June 6th, A. D. 1906, in quashing the service of the notice upon the defendant, and in dismissing said cause of action against the principal defendant without prejudice to the plaintiff, and in entering judgment against the plaintiff and in favor of the principal defendant for the costs of the action to all of which the plaintiff at the time duly excepted for the following reasons.

(1) Because the procedure and service of the notice upon the defendant was regular and as provided by law, and the defendant in appearing and filing its motion invoking the jurisdiction of the Court to determine a question of fact relating to the attachment of the cars in question, and the garnishment of the several garnishees, thereby subjected the person of the defendant and the cause
71 of action as a whole to the jurisdiction of the Court, and the Court, in assuming and entering jurisdiction to determine such question of fact thereby assumed jurisdiction of the person of the defendant, and the cause of action as a whole, and the plaintiff is therefore entitled to have the case tried as a whole in said Circuit Court of the United States.

(2) Because the attached property was subject to levy and the payment of debts the same as the property of any other non-resident.

But independent of the question of whether it was or not subject to attachment, the Court having assumed jurisdiction to determine that question necessarily took jurisdiction of the person of the defendant appearing to raise such question and the case as a whole, and thereby the plaintiff is entitled to have the case as a whole submitted, tried and determined in the said Circuit Court of the United States.

(3) Because the property and funds of the principal defendant in possession of each of the garnishee defendants is conclusively shown by the record to be subject to garnishment, and this matter of fact being submitted to the court under the principal defendant's motion, subjected the person of the defendant, its attached property, and the funds in question to the general jurisdiction of the court and entitled the plaintiff to the submission, hearing and determination of the issues tendered in the record.

(4) Because the plaintiff had the right to a hearing on the issues joined between him and each of the garnishee defendants, and was entitled to introduce evidence controverting the answers of the garnishees and the position taken by the principal defendant in reference thereto by the filing of its alleged motion to quash and set aside service.

3rd. The Court erred in the rendering of the judgment of May 22nd, 1906, and quashing the attachment and discharging the garnishees thereunder, and in rendering the judgment of June 6th, 1906, quashing the service of the notice upon the defendant and dismissing the case as to the principal defendant, and taxing
72 the costs to the plaintiff, to all of which the plaintiff at the time duly excepted, for the following reasons.

(1) Because the principal defendant, by appearing to invoke the jurisdiction of the Court and asking of it affirmative relief, made a general appearance, and subjected the defendant and its property to the jurisdiction of the Court.

WILBUR OWEN, AND
THOMAS F. BEVINGTON,
Attorneys for Plaintiff.

(Endorsed:) Assignment of Error filed with Petition for Writ of Error. Filed October 1st, 1906. A. J. Van Duzee, Clerk.

73 And on the 18th of March 1908 There was filed in the office of the Clerk of said Court in this case, a Bond on appeal which is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the Northern District of Iowa.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as the "BIG FOUR" RAILWAY, Defendant; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., CHICAGO GREAT WESTERN RAILWAY CO., CHICAGO & NORTHWESTERN RAILWAY CO., CHICAGO, BURLINGTON & QUINCY RAILROAD CO., UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants.

Bond on Writ of Error to Circuit Court.

Know all men by these presents:

That we Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, as principal, and John McHugh as surety are held and firmly bound unto Cleveland, Cincinnati, Chicago & St. Louis Railway Company, their successors or assigns, in the full and just sum of Five Hundred Dollars for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of March A. D. 1908.

Whereas, lately at a circuit court of the United States in and for the Northern District of Iowa in a suit depending in said Court beteeen Charles A. Davis, executor of the estate of Frank E. Jandt, deceased plaintiff, and Cleveland, Cincinnati, Chicago & St.
74 Louis Railway Company, defendant, a judgment was rendered against the said Charles A. Davis, executor, and the said Charles A. Davis, executor having obtained a writ of error and filed a copy thereof in the clerk's office of said Court, to reverse the judgment in the aforesaid suit, and a citation, directed to the above named defendant, and garnishee defendants, citing and admonishing them to appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 17th day of April 1908 next.

Now the condition of the above obligation is such, that if the said Charles A. Davis, executor, shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make this plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered this 2nd day of March 1908.

CHARLES A. DAVIS,
Executor of the Estate of Frank E. Jandt, Deceased.
JOHN McHUGH.

STATE OF IOWA, *Woodbury County, ss:*

I, John McHugh, surety on the above bond, do solemnly swear, that I am a resident of the State of Iowa, and a freeholder of the State of Iowa; that I am worth the sum of One Thousand Dollars, over and above the amount of my debts and have property in the State of Iowa liable to execution in the sum of Two Thousand dollars.

JOHN McHUGH.

Subscribed and sworn to before me by the said John McHugh, this 2nd day of March 1908.

[SEAL.] G. D. HICKS,
Notary Public in and for Woodbury County, Iowa.

Bond approved to act as supersedeas this 2nd day of March 1908.

HENRY T. REED, *Judge.*

(Endorsed:) Bond on Writ of Error to Circuit Court; Filed March 18, 1908 A. J. Van Duzee, Clerk.

75 And on the 18th day of March 1908 the following order was entered of record on page — of Record No. — of said Court, to-wit:

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Otherwise Known as "BIG FOUR" RAILWAY, Defendants; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO., CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., CHICAGO GREAT WESTERN RAILWAY CO., CHICAGO & NORTHWESTERN RAILWAY CO., CHICAGO, BURLINGTON & QUINCY RAILROAD CO., UNION PACIFIC RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SIOUX CITY STOCK YARDS COMPANY, Garnishee Defendants.

Order Allowing Writ of Error.

Upon this 18th day of March 1908 comes the plaintiff by his attorneys Wilbur Owen and Thomas F. Bevington, and upon their motion and upon filing a petition for writ of error and assignment of errors, intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of Five Hundred dollars which shall act as a supersedeas bond.

76 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant; CHICAGO, ROCK ISLAND & PACIFIC RY. CO., WILLMAR & SIOUX FALLS RY. CO., CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY., CHICAGO, MILWAUKEE & ST. PAUL RY. CO., CHICAGO GREAT WESTERN RY. CO., CHICAGO & NORTHWESTERN RY. CO., CHICAGO, BURLINGTON & QUINCY RAILROAD CO., UNION PACIFIC RAILROAD CO., ILLINOIS CENTRAL RAILROAD CO., SIOUX CITY STOCK YARDS CO., Garnishee Defendants.

Stipulation.

It is hereby stipulated between the plaintiff, by his attorneys and the defendants by their attorneys, that the transcript of the record on the writ of error in the above entitled cause shall be made up of the following papers and record;

The plaintiff's petition and order for attachment; The Answers of Garnishees, Chicago Rock Island & Pacific Railway Co., Willmar & Sioux Falls Ry. Co., Chicago St. Paul, Minneapolis & Omaha Ry. Co., Chicago Milwaukee & St. Paul Ry. Co., Chicago Great Western Ry. Co., Chicago & Northwestern Ry. Co., Chicago Burlington & Quincy Railroad Co., Illinois Central Railroad Co., Union Pacific Railroad Co., and Sioux City Stock Yards Co. The pleadings controverting the answers of the several garnishees. The several writs of attachment issue in said cause with the sheriff's return to the same, the original notice in said cause and proof of service thereof. The defendant's petition for removal of said cause to the Circuit Court of the United States. Defendant's bond upon such petition for removal;

77 the defendant's motion to quash and set aside service; the affidavit of E. P. Higgins; the resistance of plaintiff to defendant's special appearance and motion to quash and set aside service; affidavit of Wilbur Owen; the judgment and opinion of the Court with Plaintiff's exceptions thereto; the certificate of the trial court as to the question of jurisdiction the petition for writ of error; the assignment of errors; supersedeas bond; order allowing writ of error; clerk's certificate to transcript; citation and acceptance of service; clerk's return to writ of error and this stipulation.

WILBUR OWEN,
THOMAS F. BEVINGTON,
Attorneys for Plaintiff.

Expressly saving all manner its rights under the special appearance herein defendant agreed to the within stipulation.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By W. H. FARNSWORTH, *Its Attorney.*
CHICAGO, MILWAUKEE & ST. PAUL RY. CO., *Garnishee,*
By SHULL & FARNSWORTH & SAMMIS, *Its Attorneys.*
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, *Garnishee,*
By SHULL, FARNSWORTH & SAMMIS, *Its Attorneys.*
UNION PACIFIC RAILROAD COMPANY,
By W. L. SEARS, *Local Attorney.*
CHICAGO, ROCK ISLAND & PACIFIC RY. CO.,
By WRIGHT, CALL & WRIGHT, *Att'ys.*
WILLMAR & SIOUX FALLS RY. CO.,
By WRIGHT, CALL & WRIGHT, *Att'ys.*
CHICAGO, ST. PAUL, MPLS. & OMAHA RY. CO.,
By WRIGHT, CALL & WRIGHT, *Att'ys.*
CHICAGO & NORTHWESTERN RY. CO.,
By WRIGHT, CALL & WRIGHT, *Att'ys.*
ILLINOIS CENTRAL RAILROAD COMPANY,
By THOS. D. HEALY AND HENDERSON & FRIBOURG, *Att'ys.*
78 THE SIOUX CITY STOCK YARDS COMPANY,
By MILCHRIST & SCOTT, *Attorneys.*
CHICAGO GREAT WESTERN RY. CO.,
By J. W. HALLAM, *Its Att'y.*

(Endorsed:) In the Circuit Court of the United States in and for the Northern District of Iowa Western Division; Charles A. Davis, Executor of the estate of Frank E. Jandt, deceased, plaintiff; *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company defendant; Stipulation; Filed March 18, 1908 A. J. Van Duzee, Clerk.

And on the 23rd day of March 1908 the Clerk received and filed the following Amendment to the Instructions or Stipulation as to the transcript;

"SIOUX CITY, IOWA, *March* 21, 1908.

A. J. Van Duzee, Clerk U. S. Circuit Court, Dubuque, Iowa.

DEAR SIR: Replying to your enquiry of the 20th inst., as to construction to be put upon the Stipulation in case Charles A. Davis, Executor, &c., *vs.* Cleveland, Cincinnati Chicago, & St. Louis Ry. Co., *et al.* filed the 18th inst., naming what shall be included in making the transcript on writ of error to the U. S. Supreme Court, I would say you are correct.

You are not expected to include original pleadings and papers named, to-wit; Petitions; Answers of Garnishees; Pleadings controverting answers of Garnishees; writs of attachment and sherriff's return; original notice and proof of service, def't motion to quash and set aside service; affidavit of E. P. Higgins; resistance of plaintiff to defendant's appeal; appearance and motion to quash; affa-
79 davit of Wilbur Owen; Judgment and Opinion of the Court with plaintiff's exceptions thereto and the certificate of the trial court as to the question of jurisdiction. But you are expected to include the above as you find them in the "Bill of Exceptions" so called, and by making that "Bill of Exceptions" part of the transcript.

This is correct.

Truly yours,

WILBUR OWEN."

Filed March 23, 1908.

A. J. VAN DUZEE, *Clerk.*

80 UNITED STATES OF AMERICA, *Northern District of Iowa, ss:*

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa do hereby certify that the foregoing transcript contains a full, true and complete copy of the Bill of Exceptions, filed in the case entitled "Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, Plaintiff, *vs.* Cleveland, Cincinnati, Chicago & St. Louis Ry. Company, otherwise known as "Big Four" Railway, defendant; Chicago, Rock Island & Pacific Railway Co., Willmar & Sioux Falls Ry. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Railway Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Burlington & Quincy Railroad Company; Union Pacific Railroad Company; Illinois Central Railroad Company; Sioux City Stock Yards Company, Garnishee defendants" No. 417 Law,—which Bill of Exceptions contains all the pleadings, papers and orders of said Court mentioned, in the stipulation of the parties filed March 18, 1908, *except* Defendant's petition for removal of said cause to the Circuit Court of the United States; defendant's bond upon such petition for removal; the petition for Writ of Error; the assignment of errors; supersedeas bond; order allowing writ of error filed March 18, 1908; stipulation filed March 18, 1908, as amended by letter of Wilbur Owen, Att'y for Plaintiff dated March 22nd, 1908, addressed to the undersigned.

I further certify that the foregoing transcript contains full, true and complete copies of all the pleadings, papers, and orders of said court included in the above exceptions, to-wit; Defendant's Petition for removal of said cause to the Circuit Court of the United States; Defendant's bond upon such removal; the petition for writ of error; the assignment of errors; supersedeas bond; order allowing writ of error, filed March 18, 1908; the stipulation of
81 parties filed March 18, 1908, and amendment thereto filed March 23rd, 1908.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at my office in said District this 30th day of March A. D. 1908.

[Seal Circuit Court, U. S. Northern District of Iowa.]

A. J. VAN DUZEE,
Clerk United States Circuit Court, Northern District of Iowa.

82 Writ of Error to the Circuit Court of the Northern District of Iowa.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Circuit Court of the United States for the Northern District of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Charles A. Davis Executor of the estate of Frank E. Jandt, deceased, and Cleveland, Cincinnati, Chicago & St. Louis Ry. Company is defendant; and Chicago, Rock Island & Pacific Railway Company; Willmar & Sioux Falls Railway Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Railway Company; Chicago Great Western Railway Company, Chicago & Northwestern Railway Company; Chicago, Burlington & Quincy Railroad Company, Union Pacific Railroad Company, Illinois Central Railroad Company, and Sioux City Stock Yards Company are garnishee defendants, a manifest error has happened to the great damage of the said Charles A. Davis executor, as by his complaint appears; we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you may have the same at the city of Washington on the 17 day of April, 1908, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected,
83 the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18 day of March in the year of our Lord one thousand nine hundred and eight.

A. J. VAN DUZEE,
Clerk of the Circuit Court of the United States for the Northern District of Iowa.

Allowed by
HENRY T. REED,
Circuit Judge.

84 [Endorsed:] In the Circuit Court of the United States in and for the Northern District of Iowa. Charles A. Davis, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff, *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company, otherwise known as "Big Four" Railway, Defendant. Writ of error to the Circuit Court for the Northern District of Iowa. Filed March 18, 1908. A. J. Van Duzee, Clerk.

85 *Citation to Defendant in Error.*

THE UNITED STATES OF AMERICA, *ss:*

To Cleveland, Cincinnati, Chicago & St. Louis Railway Co., Defendant; Chicago, Rock Island & Pacific Railway Company, Willmar & Sioux Falls Ry. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Chicago, Milwaukee & St. Paul Ry. Co., Chicago Great Western Ry. Co., Chicago, Burlington & Quincy Railroad Co., Union Pacific Railroad Co., Illinois Central Railroad Co., and Sioux City Stock Yards Co., Garnishee Defendants, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington on the 17 day of April next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Iowa, wherein Charles A. Davis Executor, is plaintiff and you are defendants, and garnishee defendants in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Cresco in the circuit and district above named this 18 day of March in the year of our Lord, 1908.

HENRY T. REED,
Judge of the Circuit Court of the United States for the Northern District of Iowa.

86 STATE OF IOWA, *Woodbury County:*

J. A. Tracey being duly sworn on oath states that he is a deputy United States Marshal for the Northern District of Iowa; that he served the within citation upon the defendant Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. by delivering a true copy thereof to W. H. Farnsworth, a member of the firm of Shull, Farnsworth & Sammis, its attorneys.

All done at the City of Sioux City, County of Woodbury, State of Iowa, on the 25th day of March, 1908.

J. A. TRACY.

Sworn to before me and subscribed in my presence by the said J. A. Tracey this 27th day of March, 1908.

[Notarial Seal of George G. Yeaman.]

GEORGE G. YEAMAN,
Notary Public in and for Woodbury County, Iowa.

Marshal's fees, 2.06.
Paid by Plaintiff.

87 Due and legal service of this citation is hereby accepted this 24 day of March, 1908.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.,
CHICAGO, BURLINGTON & QUINCY RY. CO.,
By SHULL, FARNSWORTH & SAMMIS,
Their Att'ys.
CHICAGO GREAT WESTERN RY. CO.,
By J. W. HALLAM, *Att'y.*
SIOUX CITY STOCK YARDS CO.,
By MILCHRIST & SCOTT, *Attorneys.*
ILLINOIS CENTRAL RAILROAD COMPANY,
By THOS. D. HEALY,
HENDERSON & FRIBOURG, *Its Att'ys.*
UNION PACIFIC RAILROAD COMPANY,
By W. L. SEARS, *Its Att'y.*
CHICAGO & NORTHWESTERN RY. CO.,
By WRIGHT, CALL & SARGENT, *Att'ys.*
CHICAGO, ST. PAUL, MPLS. & O. RY. CO.,
By WRIGHT, CALL & SARGENT, *Att'ys.*
CHICAGO, ROCK ISLAND & PACIFIC —,
By WRIGHT, CALL & SARGENT, *Att'ys.*
WILLMAR & SIOUX FALLS RY. CO.,
By WRIGHT, CALL & SARGENT, *Att'ys.*

88 [Endorsed:] In the Circuit Court of the United States in and for the Northern District of Iowa. Charles A. Davis, Executor of the Estate of Frank E. Jandt, Deceased, Plaintiff, *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company, otherwise known as "Big Four" Railway, Defendant. Citation to Defendant in Error. Filed M-rch 28, 1908. A. J. Van Duzee, Clerk.

89 UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, do hereby certify that and return, that the Writ of Error which is hereto attached was served and filed in my office at Sioux City, Iowa, on the 18th day of March, 1908, and a copy thereof at the same time lodged in my office, and

I now return the said Writ of Error, and annexed hereto and thereto attached, an authenticated copy of the record in the cause mentioned in said Writ of Error, and the Citation and proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office in said District this 30th day of March, A. D. 1908.

[Seal Circuit Court U. S., Northern District of Iowa.]

A. J. VAN DUZEE,
Clerk United States Circuit Court,
Northern District of Iowa.

Endorsed on cover: File No. 21,105. N. Iowa C. C. U. S. Term No. 702. Charles A. Davis, executor of the estate of Frank E. Jandt, deceased, plaintiff in error, *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company *et al.* Filed April 13th, 1908. File No. 21,105.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 123.

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED,

Plaintiff in Error.

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, ET AL,

Defendants in Error.

AMENDMENT TO MOTION TO DISMISS WRIT OF ERROR AND BRIEF.

SHULL, FARNSWORTH & SAMMIS, Sioux City, Iowa,
FRANK L. LITTLETON, Cincinnati, Ohio,

For Defendant in Error.

The defendant in error now comes and respectfully asks leave of this Honorable Court to permit it to file an amendment to its motion to dismiss the writ of error herein, heretofore filed in this cause by defendant, and as and for such amendment defendant states:

7th. That the jurisdiction of the Federal Court was invoked solely upon the ground of diversity of citizenship, and jurisdiction of the Federal Court attached on that ground alone. No other question of jurisdiction ever arose in the case.

BRIEF ON THE AMENDMENT TO THE MOTION.

This cause was originally commenced in the State Court, being an ordinary action of attachment on the ground of non-residence of the defendant. At the proper time the defendant filed its petition and bond for removal into the Federal Court on the sole ground of diversity of citizenship, and the jurisdiction of the Federal Court attached upon that ground, and no other. No other question of jurisdiction of the Federal Court ever arose in the case. It is true, the defendant on appearing specially in the Federal Court invoked the commerce clause of the Federal Constitution as a reason why the property sought to be attached could not be so attached, but that was a question that could have been raised with equal force in the State Court and one which the State Court could have interpreted and determined equally with the Federal Court. In other words, the constitutional question which the defendant's special appearance developed was one merely of interpretation, and the jurisdiction of the Federal Court did not at all rest upon that question.

Therefore, under the certificate upon which the writ of error was granted in this case, no appeal lies directly to this Court, and the writ of error should be dismissed.

Re Jones, 164 U. S., p. 691.
Rouse vs. Letcher, 156 U. S., p. 47.
Benjamin vs. New Orleans, 169 U. S., p. 161.
Borgmeyer vs. Idler, 159 U. S., p. 408.
Ayres vs. Polsdorfer, 187 U. S., p. 585.
Spencer vs. Duplan Silk Co., 191 U. S., p. 526.

SHULL, FARNSWORTH & SAMMIS,
FRANK L. LITTLETON,
for Defendants.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 341

CHARLES A DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, PLAINTIFF IN ERROR,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL, DEFENDANTS IN ERROR.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT.

This was an action originally commenced in the State Court of Iowa by an executor of the estate of a deceased person, whom it was claimed was killed in the State of Illinois by the negligence of the defendant, a railway common carrier, corporation of Indiana and Ohio, not operating in Iowa, nor having any agent there. Service on the defendant was attempted in the State Court by garnishing certain other railway companies in whose possession certain cars alleged to belong to the defendant were found. The defendant at the proper time removed the cause into the Federal Court on the ground of diversity of citizenship,

and there filed a special apperance, and a motion to quash the service, supported by affidavit showing that the cars so in the hands of the other railway companies, so garnished, were engaged in Interstate Commerce, and were so in the possession of the other companies by reason of the Interstate Commerce Act, and by contract permitting the companies in whose possession they were to use the same until they were returned to the possession of the defendant. The Circuit Court found, as a matter of fact, that the cars were engaged in Interstate Commerce, and that the said contracts existed, and dismissed the cause.

On the 28th day of September, 1906, the Circuit Court, by Reed signing as District Judge, granted a writ of error to this Court, and in the order so granting the writ, Reed, as District Judge, certified that in entering the judgment complained of by the plaintiff in error, "The sole question considered and determined by the Court was that the Court had no jurisdiction over the person of the defendant, or of the property involved, and that the apperance of the defendant was a special, and not a general apperaance, and did not subject the defendant and its property to the jurisdiction of the Court."

On October 1, 1906, the said Circuit Court granted a writ of error from the judgment herein to the Circuit Court of Appeals for the 8th Circuit, and thereafter said writ of error was prosecuted in said Circuit Court of Appeals, and there on October 19, 1907, dismissed, (see 158 Fed. R., p. 775) and on the 18th day of March, 1908, the Circuit Court for the Northern District of Iowa, granted another order for writ of error to this Court, as follows: "Upon this 18th day of March, 1908, comes the plaintiff by his attorneys,and upon their motion, and upon filing a petition for writ of error and assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in

the premises. On consideration thereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $500.00, which shall act as a supersedeas bond." Thereafter the clerk of said Circuit Court of the Northern District of Iowa, on the 18th day of March, 1908, issued a writ of error, upon which writ of error, a record of the case was filed in this Court during the month of April, 1908. No petition or assignment of errors was filed for the writ of error granted March 18, 1908, the one now being here prosecuted.

The certificate granted by the Circuit Court on September 28, 1906, was the only certificate ever made in the case as to any jurisdictional questions, and does not contain any statement of the questions or facts involved, and it was not granted at or during the term time at which the judgment appealed from was rendered.

The purpose of this motion is to obtain a dismissal of the writ of error upon the following grounds:

1st. That the alleged certificate as to the jurisdiction of the court was not granted during the term at which the judgment against the plaintiff was entered, said judgment having been entered on the 22nd day of May, 1906, (Trans. Recd. p. 39) during the May, 1906, term of the United States Circuit Court sitting at Sioux City, in the Northern District of Iowa, which term actually ceased on the 6th day of June, 1906, and the certificate was not granted nor signed by the judge until the 28th day of September, 1906, just prior to the commencement of the October term of said court, which by Sect. 537, Title 13, Chapt. 1, U. S. Statutes, is fixed for the first Tuesday of October at Sioux City, Iowa, and said certificate was granted by the judge at Chambers in another part of the district, as shown by the affidavit of J. H. Bolton, Deputy Clerk of said Court, hereto attached and made a part of this motion, marked Exhibit "A."

2nd. For that the appeal and writ of error herein was not perfected in time, as required by law, in that the said appeal and

certificate was allowed on the 28th day of September, 1906, (Trans. Recd., p. 41,) and was not prosecuted in this Court until April, 1908, several terms of this Court having intervened between the allowance of said appeal and the prosecution of the same in this Court.

3rd. For that said certificate is not sufficient under the law, and is not in proper form in that it does not state any facts or propositions of law upon which the question of the Court's lack of jurisdiction rested. The form of the certificate allowed herein requires this Court to search the entire record to ascertain the jurisdictional questions sought to be certified.

4th. For that the jurisdictional questions here attempted to be certified are not such as the statute contemplates should be certified directly to this Court, in this: It is not a case or question where the jurisdiction of the Federal Court, as a Federal Court, is put in issue, it merely presents a question of jurisdiction applicable and common to all courts alike.

5th. Because the judgment complained of, and the whole case, was taken by writ of error to and heard in the Circuit Court of Appeals for the 8th Circuit, (see Exhibit "B" hereto attached and made a part hereof) and there decided, and no appeal therefrom has been taken or certified, and the writ of error should be from the Circuit Court of Appeals, and not the Circuit Court for the Northern District of Iowa, which latter court had lost jurisdiction of said cause when the same was appealed to said Circuit Court for the 8th Circuit, and never again was given jurisdiction thereof, and because the judiciary act does not permit two appeals.

6th. For the reason that there is no certificate of any jurisdictional question granted by the trial court in the order

allowing the writ of error now being prosecuted in this Court, to-wit, the order and writ of March 18, 1908.

SHULL, FARNSWORTH & SAMMIS,
Sioux City, Iowa,
Attys. for Defendants in Error.

FRANK L. LITTLETON,
Cincinnati, Ohio.
General Attorney for Defendant in Error, Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

EXHIBIT "A."

State of Iowa, *Woodbury County, ss.*

J. H. Bolton, being duly sworn accord ng to law, deposes and says that he is the Deputy Clerk of the Circuit Court of the United States for the Northern District of Iowa, Western Division, located at Sioux City, Iowa; that Judge Reed, presiding at said May term, 1906, left Sioux City the 6th day of June, 1906, and that the certificate signed by Judge Reed, of said Court, on the 28th day of September, 1906, in the case of Charles A. Davis, Executor of the estate of Frank E. Jandt, deceased, *vs.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company, et al. was not granted by said judge while at Sioux City, as I remember and verily believe.

J. H. BOLTON.

Subscribed and sworn to before me by J. H. Bolton on this 8th day of July, 1908.

W. H. FARNSWORTH,
(SEAL.) *Notary Public in and for Woodbury County, Iowa.*

EXHIBIT "B."

United States of America, *State of Iowa, ss.*

I, J. H. Bolton, Deputy Clerk of the Circuit Court of the United States for the Northern District of Iowa, sitting at Sioux City, Iowa, hereby certify that the within cause was on the 1st day of October, 1906, appealed to the Circuit Court of the United States for the 8th Circuit, and full record and transcript thereof

duly certified and filed in said Court, which appeal was so taken from the order and judgment of the Circuit Court of the United States for the Northern District of Iowa, made and entered on the 22nd day of May, and 6th day of June, 1906.

J. H. BOLTON,

(SEAL.) *Deputy Clerk of the Circuit Court of the United States for the Northern District of Iowa.*

BRIEF AND ARGUMENT.

I.

The certificate of the trial court as to the jurisdictional question was not granted in time, as required by law.

The Bayonne, 159 U. S., p. 687.

Chappell *vs.* U. S., 160 U. S., p. 499.

Colvin *vs.* City of Jacksonville, 158 U. S., p. 456.

Chamberlain *vs.* Peoria Ry. Co., 118 Fed., p. 32.

II.

The appeal has not been prosecuted within the time required by law. The appeal and the writ of error were allowed on September 28, 1906, and the only certificate as to any jurisdictional question that has ever been granted or filed in the case, was made on that date, and filed in the Clerk's office of the Circuit Court on October 1, 1906, the appeal thereupon was not filed nor prosecuted in this Court until April, 1908. This Court has not jurisdiction of the appeal, because more than one term of this Court has intervened since the allowance of the appeal, and the filing of the same in this Court.

Edmonson *vs.* Bloomshire, 7 Wall. (U. S.), p. 309.

Steamer Virginia *vs.* West, 19 Howard (U. S.), p. 182.

Castro *vs.* U. S., 3 Wall., p. 47.

2. It is ground for dismissal of a writ of error, or an appeal, that it is not taken within the time prescribed by the statute.

Whitsitt *vs.* Depot Co., 122 U. S., p. 363.

White *vs.* Iowa Nat. Bank, 71 Fed., p. 97.

III.

If the certificate granted by the trial court on the 28th day of September, 1906, can now be considered by this Court as the certificate upon which this appeal is to be considered, it is clearly insufficient under the law in that it does not state upon what question the judgment was rendered. The certificate is such in form as to require this Court to search the entire record to determine the question of jurisdiction involved.

In Shields *vs.* Coleman, 157 U. S., p. 178, this Court said:

"This Court will not of itself search, nor follow counsel in their search of the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction."

And in Maynard *vs.* Hecht, 151 U. S., p. 324, this Court said: "Each question has to be a distinct point or proposition of law, clearly stated, so that it can be definitely answered without regard to the other issues of law in the case."

See, also, Chappell *vs.* U. S., 160 U. S., p. 499.

Hollowell *vs.* U. S., Sup. Ct. Adv. Sheets, May 1, 1908, p. 498.

Trust Co. *vs.* Knott, 191 U. S., p. 225.

IV.

If any jurisdictional question is presented to this Court by this appeal, it is not such a jurisdictional question as is contemplated by the Judiciary Act of 1891, which shall be certified directly to this Court.

The jurisdiction of the Court was not questioned over the parties to the suit, nor the subject matter of the suit, nor because it was a Federal Court. Merely the method of service was questioned, and that question applied equally to the State Courts.

In Trust Co. *vs.* Knott, 191 U. S., p. 225, this Court said: "The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court, as a Federal Court, and in Bache *vs.*

Hunt, 193, U. S., p. 523, this Court dismissed the appeal because it was said, "The jurisdiction of the Circuit Court was only questioned in respect to its general authority as a judicial tribunal, and not in respect to its power as a court of the United States.

See further, Courtney *vs.* Pradt, 196 U. S., p. 89.

Smith *vs.* McKay, 161 U. S., p. 355.

The jurisdictional questions here involved could and should have been determined by the Circuit Court of Appeals.

V.

1. The case was taken to the Circuit Court of Appeals by writ of error and there argued on its merits, hence this appeal or writ of error should have been to the Circuit Court of Appeals.

McLish *vs.* Roff, 141 U. S., pp. 661-669, wherein it is said: "When the judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction, alone, or to the Circuit Court of Appeals upon the whole case. If the latter, then the Circuit Court of Appeals may if it deem proper, certify the question of jurisdiction to this Court."

2. The Court lost jurisdiction, having granted an appeal to the Circuit Court of Appeals, which said appeal was prosecuted to the latter court, and there being no order from that court to the Circuit Court for the Northern District of Iowa directing any further action, the Circuit Court never regained jurisdiction to grant the writ of error now attempted to be prosecuted.

3. Because it is an attempt to prosecute two appeals, which this court has repeatedly decided cannot be done.

Robinson *vs.* Caldwell, 165 U. S., pg. 359.

Loeb *vs.* Columbia, 179 U. S., p. 472.

Bank of Memphis *vs.* City of Memphis, 189 U. S., p. 71.

SHULL, FARNSWORTH & SAMMIS,
Sioux City, Iowa.
Attorneys for Defendant in Error

FRANK L. LITTLETON, Cincinnati, Ohio,
Gen. Atty., Defendants in Error.

Commencing after the word "courts" at the end of line 8, Division 1V, page 7 of the brief:

There is no question but what under the state practice, where the case was commenced, jurisdiction could have been obtained and sustained in the manner attempted, if the property attached was subject to service of attachment process. Our contention is that the property was not subject to attachment because exempt under the Commerce Act of Congress. That presents the question, not of the jurisdiction of the court, but as to whether the property is so exempt; such question could be determined by either the State or the Federal Court, and is not strictly a jurisdictional one, certainly not such as is contemplated by Sec. 5, of the Act of March, 1891, that should be certified directly to the Supreme Court.

It seems that this is not such a question as this court has decided in the Hammond-Elevator case, nor in the Kendall case, 198 U. S., 477. It is not whether service may be made upon a certain person or in a certain manner; it is merely whether certain property may be reached by attachment process, and judgment rendered against that property. There never was any contention on the part of any one that the process conferred jurisdiction over the person of the defendant.

The constitutionality of the state laws has never been questioned in this case; merely its application to the property involved. There is no federal question raised in the case.

In the Supreme Court of the United States.

OCTOBER TERM, 1908

No. 341.

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED.
Plaintiff in Error.

vs.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Et Al.
Defendants in Error.

BRIEF ON RESISTANCE TO MOTION TO DISMISS WRIT OF ERROR.

STATEMENT.

The principal point upon which defendant in error relies for a dismissal of the writ of error is: That the certificate of the trial court as to the question of jurisdiction upon which the cause was determined was not given during term time, as required by law. And in this connection counsel for defendant in error, have either designedly or ignorantly misstated the record, and have either purposely or through ignorance confused the granting of a certificate during term time as to jurisdictional questions, with the allowance of a writ of error, which may be done at any time within two years from the rendition of the judgment.

There are *two* judgments rendered in this case, one on May 22, 1906, and one on June 6, 1906. Record pages 39-40.

Court did not adjourn *sine die* as erroneously stated by counsel for defendant in error on June 6, 1906, nor at any other time until October 1, 1906, as is shown by the affidavit of J. H. Bolton, the clerk, hereto attached. On September 28th, "the same being one of the regular days of the May, A. D. 1906, term of said court," the court certified the record and bill of exceptions, and gave the certificate: That "*the sole* question considered and determined by the court, was that the court had no jurisdiction over the person of the defendant or the property involved," etc., which is found at page 41 of the record.

The court did *not* on said September 28th grant a writ of error to this court as erroneously asserted by counsel for defendant in error, and the record does not so show. The writ of error to this court was allowed on March 18, 1908, as shown by the record, page 49.

Now, a writ of error was taken or attempted to be taken to the Circuit Court of Appeals for the 8th Circuit, but as shown by the exhibits attached to this resistance of the plaintiff in error, and as is also shown by the report of the proceedings found in 156 Fed., 775 the Circuit Court of Appeals refused to entertain jurisdiction of the writ of error, but dismissed the same for the express reason that this court alone had power to review the decision of the court below, and the cause was not decided, as erroneously stated by counsel for defendant in error, but dismissed for want of jurisdiction.

The plaintiff in error resists the motion of defendant in error to dismiss the writ of error and replies to the grounds of said motion as follows:

Comes now the plaintiff in error, Charles A Davis, executor, etc., and files this his resistance to the motion of the defendant in error to dismiss the writ of error in this cause, and respectfully advises the court:

1st. That the defendant in error is mistaken in the first

division of its motion, wherein it states that the certificate as to the jurisdiction of the Circuit Court was not granted by the court during the term at which judgment was rendered, to-wit: the May term 1906, for that the certificate of the court itself recites:

"Now on this 28th day of September, A. D. 1906, the same being one of the regular days of the May, A. D. 1906 term of said court," etc., and concludes "Dated this 28th day of September, 1906. HENRY T. REED,

District Judge of the United States for the Northern District of Iowa, Western Division."

(See Record, pages 40-41.)

Defendant is also in error wherein it states that "said judgment having been entered on the 22nd day of May, 1906, during the May term, 1906, of the United States Circuit Court sitting at Sioux City, in the Northern District of Iowa, which term actually ceased on the 6th day of June, 1906."

There were *two* judgments rendered by the court below, one on May 22, 1906, and one on June 6, 1906. See record, pages 39-40.

Said court did *not* "actually adjourn on June 6, 1906." It continued in session until the beginning of the October term, 1906, as is shown by affidavit of J. H. Bolton, deputy clerk of the said court, hereto attached and made a part of his resistance marked Exhibit "A."

2nd. Said appeal was perfected in time. The writ of error was allowed by the judge of the said court on March 18, 1908, and the writ of error issued upon the same date, which was within two years from the rendition of the judgment. (See Record, pages 49-53.)

The certificate as to question of jurisdiction was signed on September 28, 1906 "during the term" as required by law. The granting of the certificate as to jurisdiction is not the allowance of the appeal.

3rd. The certificate is in proper form, and, under the record so certified, clearly shows that there was but a single question, and that a question of jurisdiction, which was submitted to and decided by the court below. There was but the one question of jurisdiction considered in the entire record, and it is so certified.

4th. The question of jurisdiction certified to this court by the court below, was a question as to the jurisdiction of the Circuit Court to entertain the action, for that it was claimed the jurisdiction had not been acquired by the process of attachment of property, nor by the voluntary appearance of the defendant to obtain the release of its property. There was an absolute denial by the court below of its jurisdiction over the attached property, and over the person of the defendant. This is a case of denial of jurisdiction proper to be certified to this court.

5th. It is conceded that a writ of error was taken to the Circuit Court of Appeals for the 6th Circuit in this cause, and attempted to be prosecuted there, but the writ of error was not entertained by said Circuit Court of Appeals but was dismissed for lack of jurisdiction, and for the reason, that the record showed only a question of jurisdiction was involved, which under the Act of 1891 should be certified directly to this Court, and said Circuit Court of Appeals rendered no decision or opinion upon the merits, but dismissed the writ for lack of its own jurisdiction. And subsequent to such dismissal a writ of error was allowed to this court. All of which is more particularly shown by a certified copy of the judgment and opinion of said Circuit Court of Appeals hereto attached and made a part hereof, marked Exhibits "B" and "C."

6th. In this case it makes no difference whether a certificate as to a question of jurisdiction was granted in term time or granted at all, or whether it is in proper form, nor that a writ of error was attempted to be prosecuted to the Circuit Court of Appeals.

For the reason that the record plainly discloses that the case

involves the construction and application of the "Commerce Clause" of the United States Constitution and Acts of Congress passed under the authority of such Commerce Clause of the Constitution, and also involves the constitutionality of the laws of the State of Iowa, authorizing attachments in so far as the same may authorize the attachment of property engaged in interstate commerce, to-wit sections 3076-3096 of the Code of Iowa, and the whole case is in this court for review upon its merits upon all questions presented by the record under Section 3, Act of 1891. The jurisdiction of the court below was denied upon the authority of the Commerce Clause of the Federal Constitution, and laws of the United States passed under the authority of said Commerce provision, and the laws of the State of Iowa in so far as they authorized the attachment of property of an interstate character were held to be violative of the Federal Constitution, and the cause is in this court upon direct appeal from such holding.

ELBERT H. HUBBARD,
of Sioux City, Iowa,
WILBUR OWEN,
of Sioux City, Iowa,
For Plaintiff in Error.

EXHIBIT "A."

State of Iowa, Woodbury County, ss:

J. H. Sutton being duly sworn, on oath deposes and says: That he is the Deputy Clerk of the Circuit Court of the United States for the Northern District of Iowa, Western Division, held at Sioux City, Iowa, that the Hon. Henry T. Reed is the presiding judge of said court.

That the May term , 1898, of said Court was not adjourned sine die at any time, until the beginning of the October term, 1898, viz: October 1, 1898, but remained open for the transaction of all business which might properly come before it, aside from the actual trial of causes, including the hearing of motions

and demurrers, and the entry of judgments and decrees, and no final adjournment was taken until the beginning of the said October term, but that the said court was open and in continuous session until said October term, 1906, which began on October 2, 1906.

J. H. BOLTON.

Sworn to before me and subscribed in my presence by the said J. H. Bolton, this 9th day of October, 1908.

GEORGE G. VEAMAN,
Notary Public.

EXHIBIT "B."

United States Circuit Court of Appeals. Eighth Circuit. September Term, 1907. Saturday, October 19, 1907.

In Error to the Circuit Court of the United States, for the Northern District of Iowa.

Charles A. Davis, Executor of the Estate of Frank E. Janit, deceased, Plaintiff in Error, vs. Cleveland, Cincinnati, Chicago and St. Louis Railway Company, otherwise known as the "Big Four" Railway Company, defendant; and Chicago, Rock Island and Pacific Railway Company, Willmar and Sioux Falls Railway Co., Chicago, St. Paul, Minneapolis and Omaha Railway Co., Chicago, Milwaukee and St. Paul Railway Company, Chicago Great Western Railway Company, Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Union Pacific Railroad Company, Illinois Central Railroad Company and Sioux City Stock Yards Company, Garnishees.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error to the said Circuit Court, in this cause, be, and the same is hereby, dismissed with

costs, for want of jurisdiction; and that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, otherwise known as the "Big Four" Railway Company, defendant; and Chicago, Rock Island and Pacific Railway Company, Willmar and Sioux Falls Railway Co., Chicago, St. Paul, Minneapolis and Omaha Railway Co., Chicago, Milwaukee and St. Paul Railway Company, Chicago, Great Western Railway Company, Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Union Pacific Railroad Company, Illinois Central Railroad Company and Sioux City Stock Yards Company, Garnishees, have and recover against Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, the sum of twenty dollars for their costs herein. October 19, 1907.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the judgment in the case of Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, Plaintiff in Error, vs. Cleveland, Cincinnati, Chicago and St. Louis Railway Company, et al., No. 2304, as full, true and complete as the original of same remains on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of October, A. D. 1908.

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

EXHIBIT "C."

United States Circuit Court of Appeals. Eighth Circuit. No. [illegible]. September Term, A. D., 1907.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Charles A. Davis, Executor of the Estate of Frank E. Jandt, deceased, plaintiff in error, vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, et al., defendants in error.

Mr. Wilbur Owen and Mr. Thomas F. Bevington for the plaintiff in error.

Mr. W. H. Farnsworth (Mr. Delos C. Shull and Mr. J. U. Sammis were with him on the brief) for the defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

Hook, Circuit Judge, delivered the opinion of the court.

Charles A. Davis, as executor, sued the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in a state court of Iowa upon a cause of action for the death of his testate which occurred in Illinois. The defendant railway company was organized under the laws of Indiana and Ohio, and owned and operated lines of railroad in those states and in Illinois, but it had no lines of road and no agents or agencies in Iowa where the action was brought. So to obtain jurisdiction the plaintiff caused an original notice of the commencement of the action containing also an admonition to answer by a specified date to be served on the secretary of defendant at its general offices in Cincinnati, Ohio, and also caused writs of attachment and garnishment to be issued directed for service to sheriffs of counties in Iowa. The writs of garnishment were served upon certain railroad companies doing business in Iowa and having traffic relations with the defendant, and some freight cars of the defendant in the possession of the garnishees were also attached. Notice of the attachments and garnishments was served on defendant in Ohio. The defendant removed the cause to the Circuit Court of the United States for the Northern District of Iowa and thereupon filed in that court a motion in which it said that it appeared specially for the purpose of objecting to the jurisdiction of the court over its person and

its property, and it moved to quash and set aside the service of the writs of attachment and garnishment. The plaintiff filed a resistance to the motion. Upon hearing the Circuit Court held that defendant's appearance was not a general one and therefore it had not submitted itself to the jurisdiction of the court; that the service of the notices in Ohio did not confer jurisdiction of the person; that the cars attached in Iowa were temporarily there having been brought by the garnishees into that state from points without, and that when brought within the state and when attached they were employed in interstate commerce and in the fulfillment of duties in respect of such commerce imposed on defendant and the garnishees, its connecting carriers, by the laws of the United States; that the credits of defendant in the hands of the garnishees were shifting traffic balances ascertainable and payable at Chicago, Illinois, and a part of and inseparably connected with the commerce mentioned; that the cars were not attachable and the credits not subject to garnishment and therefore the court had not lawfully secured jurisdiction of any property of defendant. The motion to quash was sustained and the action was dismissed without prejudice.

The plaintiff sued out a writ of error from this court.

It is not claimed by plaintiff that service of the notice in Ohio was effectual to confer jurisdiction over the person of defendant. These are the questions: Was defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the cars and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions they are not distinguishable from one of the

legality of the service of summons upon a defendant. They do not pertain to the merits of the case and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power it termed jurisdiction. It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a non-resident because the power of the court to proceed to trial depends in the absence of the defendant upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defendant and the decision disposed of the case. Under the Court of Appeals Act of 1891, the Supreme Court alone has power to review such a decision. *Board of Trade vs. Hammond Elevator Co.* 198 U. S. 424; *United States vs. John*, 155 U. S. 109; *St. Louis Cotton Compress Co. vs. American Cotton Co.*, 60 C. C. A., 80, 125 Fed. 196.

The writ of error is dismissed.

Filed October 19, 1907. A true copy.

Attest: JOHN J. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

BRIEF AND ARGUMENT.

The first point involved in the motion of defendant in error is based upon the false assumption, and erroneous statement of counsel that the certificate as to jurisdiction was not granted by the court below during the same term at which the judgment was rendered, and hence the authorities cited are not in point.

The judgments were rendered in May 22nd and in June 6th, at the regular May, 1906, term of court which is admitted to have commenced in May 22nd. Record, 39-40.

The certificate was granted on September 29th, 1906, and at the beginning of the certificate to the record which just precede the certificate as to jurisdiction, the court recites "now on this 29th day of September, 1906, the same being one of the regular

days of the May, A. I. 1906, term of said court." Then follows the certificate to the record which in turn is immediately followed by the certificate to the jurisdictional question, and all is "dated this 28th day of September, A. D. 1906." We do not think it competent for anyone to impeach the certificate thus made, but to settle the question beyond controversy we here attached to our resistance the affiavit of J. H. Bolton, Deputy Clerk, to the effect that the May, 1906, term of court did not adjourn till October 1st, 1906.

II.

Defendant in error in the 2nd division of its motion states, "the appeal has not been prosecuted within the time required by law. The appeal and the writ of error were allowed on September 28th, 1906." This is such a palpable misstatement of the record as to seem almost deliberate. The certificate as to the jurisdictional question upon which the judgments were rendered, was granted on September 28th, 1906, during term time as required by law. But this is not the appeal. The appeal is perfected by granting the writ of error, and this may be at any time within two years from the rendition of the judgment, and in this case was allowed on March 18th, 1908, upon a petition for the same filed October 1st, 1906. Record, pages 49, 44, 45.

Counsel for defendant in error confound the giving of the certificate as to jurisdictional question involved with the order allowing the writ of error.

When the record is properly understood by the learned counsel they will see that the appeal has been prosecuted in time and that the present term is the first term since the allowance of the writ of error so for that reason the authorities cited by defendant in error upon this branch of the motion are not in point.

III.

Defendant in error in the third division of its motion contends that the certificate of the court below as to the jurisdictional

question involved is insufficient. In this it is in error. In view of the record, the certificate is as full and sufficient as it could well be without embodying the substance of the opinion.

The motion presented by the defendant in error assailed the jurisdiction of the court over its person and property, and that only. It could do nothing more without being beyond question a general apperaance. So this was the only question presented to the court for its determination. (Record, page 20.) There was no other question in the case, and the certificate so recites.

"And in this case, I the undersigned Judge of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division do further certify that in sustaining the motion to quash the attachment and discharging the garnishees, and in dismissing the action as to the principal defendant and taxing the costs to the plaintiff, the *sole* question considered and determined by the court was that the court had no jurisdiction over the person of the defendant or of the property involved, and that the appearance of the principal defendant as shown by the record was a special and not a general appearance, and that the same did not subject said principal defendant to the jurisdiction of the court.

This certificate is made conformable to the Act of Congress March 3, 1891, Chapter 317, *and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.*"

The opinion of the court below is thus practically made a part of the record.

It is true that this court should not be obliged to "search the record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction," but in the instant case there was but the one question, and that a question of jurisdiction over the person and property of the defendant in-

volved and it is so certified, and the entire record deals with that question alone.

In *Maynard vs. Hecht*, 151 U. S., 178 and *Chappell vs. U. S.*, 160 U. S., 499, cited by defendant in error there was no certificate at all, so those cases are not in point. In *Trust Co. vs. Knott*, 191 U. S., 225, cited by defendant in error the question of the sufficiency of the certificate was not considered or decided. The Circuit Court of Appeals in this case held that the question involved was a sole question of jurisdiction, and for that reason denied its own jurisdiction and dismissed the appeal.

The writ of error was allowed upon the petition of plaintiff in error reciting that " the said court rendered further judgment dismissing the said cause of action as to the principal defendant on the ground that the court had no jurisdiction of the defendant or the attached property of the defendant." Record, page 45.

So that by the record as a whole, the petition for writ of error, and the certificate of the court below it appears that the *sole* question considered or decided was that the court had no jurisdiction over the person or property of the defendant. This fully answers the requirements of the law.

U. S. vs. Jahn, 155 U. S., 109.

U. S. vs. Larkin, 208 *U. S.*, 333.

Shields vs. Coleman, 157 U. S., 177.

In re Lehigh Min. Etc. Co., 156 U. S., 322.

Interior Constr. Co. vs. Gibney, 160 U. S., 217.

Chappell vs. U. S., 160 U. S., 499.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 185 U. S., 285.

Smith vs. McKay, 161 U. S., 355.

In *Excelsior W. P. Co. vs. Pacific Bridge Co.*, 185 U. S., 285, there was no formal certificate at all, but the decree recited: "That said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this

court, and that this court should not further exercise jurisdiction, and it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction."and the only certificate was the recital in the order allowing the appeal that the appeal was allowed, "from the final order and decree dismissing said suit for want of jurisdiction," and this court held this a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue.

IV.

The contention urged by the defendant in error in the 4th division of its motion to dismiss, seems to be that no question of jurisdiction proper to be certified to this court was considered by the court below, and in this connection counsel state, "the jurisdiction of the court was not questioned over the parties to the suit." That was the very question at issue and the very question decided.

None of the authorities cited by defendant in error upon this branch of the motion are in point. In none of them did the question certified involve the want of "power" but rather the want of equity, or that the remedy was at law and not in equity.

But in the case at bar the power of the court is directly involved, at the threshold of the proceeding, jurisdiction over the person and property of the defendant in error is challenged, and the case falls within the rule announced in

Shepard vs. Adams, 168 U. S., 618.

Where it is said: "The present case differs from *Smith vs. McKay* in the essental feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction."

Wetmore vs. Rymar, 169 U. S., 115.

Powers vs. Cheapeak R. Co., 169 U. S., 92.

St. Louis Cotton Compress Co. vs. American Cotton Co., 125 Fed. Reporter, 201.

In the latter case in an able opinion by Judge Sanborn this question is fully discussed and *Shepard vs. Adams*, 168 U. S., 618 is followed.

We also call the attention of this court to the opinion of the Circuit Court of Appeals in dismissing the appeal in that court. Its opinion is not controlling, but the appeal was dismissed for the sole and only reason that the case was one in which a direct appeal should have been taken to this court.

The court there saying, "the question of jurisdiction was decided in favor of the defendant and the decision disposed of the case." Under the Court of Appeals Act of 1891 the Supreme Court alone has power to review such a decision." See this case 156 Fed. Rep. 775.

We call the court's attention to the case of *Board of Trade vs. Hammond Elevator Co.*, 198 U. S., 424, when the authorities are collected and reviewed by Mr. Justice Brown.

V.

Lastly it is contended by defendants in error that, the writ of error to this court should be dismissed for the reason that a writ of error had been attempted to be prosecuted to the Circuit Court of Appeals and cases are cited to the effect that two separate appeals can not be prosecuted at the same time, one to the Circuit Court of Appeals and one to this court, nor can an appeal be prosecuted to this court upon the question of jurisdiction certified, after an appeal has been prosecuted to the Circuit Court of Appeals and a decision there had upon the merits. But such is not the instant case. The Circuit Court of Appeals dismissed the writ of error for lack of its own jurisdiction to entertain the same. It was as though no writ of error had ever been allowed. The attempt was futile. The Circuit Court of Appeals expressly

holding that there was but the one question and that a question of jurisdiction involved, which should be certified to this court.

This case then is ruled by *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co.*, 185 U. S., 282, which in its history is exactly similar to the case at bar. In that case the plaintiff in error appealed to the circuit Court of Appeals where its appeal was dismissed for want of jurisdiction and an appeal was then taken to this court from the judgment of the Circuit Court and this court said: "The case case being thus in proper condition for appeal, such appeal could be taken at any time within two years.' The proceeding in the Circuit Court of Appeals was void.

U. S. vs. Larkin, 208 U. S., 333.

VI.

This cause directly involves the construction of the Constitution and the application of the Commerce Clause of the Constitution of the United States. and also involves the constitutionality of the laws of Iowa authorizing attachments in so far as these laws affect interstate commerce, and the entire cause is reviewable here on direct appeal.

The motion filed by the defendant in error directly challenges the jurisdiction of the court over the attached property for the reason that it was engaged in interstate commerce, and "that by reason of the Commerce Clause of the National Constitution and of the Interstate Commerce Act of Congress said cars can not be levied upon under writ of attachment in this state." Record, page 22.

The opinion of the court below holds that the cars when attached were engaged in interstate commerce, and for that reason their seizure was violative of the Federal Constitution and laws enacted by Congress under the authority of the Commerce Clause of the Constitution, and in effect holds that the laws of Iowa authorizing attachments are unconstitutional as authorizing an

interference, or a regulation of "commerce between the states." Record, pages 33, 34, 35, 36, 37.

The court below in its opinion holds as follows: "The execution of attachment laws of the several states doubtless were not intended primarily, as burdens upon or as an interference with interstate commerce, but if the instrumentalities of such commerce when being lawfully used therein may be seized and held under such laws, then when enforced they would in fact be a most serious burden upon or interference with that commerce, *and to the extent that they so authorize they are as obnoxious as if that had been their primary purpose.*" Record, page 37.

So we are entitled to have the whole case reviewed here regardless of all other questions presented by the motion, under divisions 4, 6 of Section 5, of the Court of Appeals Act of 1891.

Chappell vs. U. S., 160, U. S., 499.

Boske vs. Cominggore, 177, U. S., 459.

ELBERT H. HUBBARD,
of Sioux City, Iowa,
WILBUR OWEN,
of Sioux City, Iowa.
For Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 123.

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, *Plaintiff in Error,*

vs.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL., *Defendants in Error.*

SUPPLEMENTAL AND REPLY BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

PREFATORY.

This brief will be in the nature of both a supplemental and reply brief on the motion to dismiss the writ of error in this case. We will discuss only the "fourth" ground of the motion to dismiss, namely, that the jurisdictional

question sought to be raised in this case is not a question of the jurisdiction of the Circuit Court of the United States as a federal court, but a jurisdictional question which applied to all courts alike.

The Facts and Question Raised.

The facts showing how the question of jurisdiction was raised are fully stated in our original brief on the motion to dismiss.

It is well, however, to keep in mind that this suit was begun in the state court; that all process issued and steps taken to obtain jurisdiction were taken in the state court. At the time the petition to remove to the federal court was filed, all steps to obtain jurisdiction had been taken. After the removal to the federal court no steps of any kind were taken to obtain jurisdiction. So far as jurisdiction is concerned the case has at all times remained in precisely the same condition it was in when the petition to remove was filed in the state court, so that if there was jurisdiction over defendant in error at the time the petition to remove was filed, there is still jurisdiction over the defendant in error, and, on the other hand, if there was no jurisdiction over defendant in error at the time the petition to remove was filed, there is still no jurisdiction over it.

The jurisdiction of the Circuit Court of the United States as a federal court was not in any way put in issue. The question raised was whether the steps taken to obtain jurisdiction over the defendant were sufficient to confer jurisdiction over it in either the state court or the federal court. If the case had remained in the state court the question raised would have been precisely the same as it now is, and could have been as readily raised in the state court as it was in the federal court.

Jurisdiction of Federal Court as Such Not in Issue.

We think it clear, under the statutes and decisions, that the jurisdiction of the Circuit Court as a federal court was not in issue in this case, and that there was, therefore, no right to bring this case to this court direct from the Circuit Court.

By section 4 of the Circuit Court of Appeals Act (26 Stat. at L. 827), all appellate jurisdiction from the district and circuit courts is vested in either the Supreme Court or the Circuit Court of Appeals.

By section 5 of the same act the cases in which appeals or writs of error may be taken from district courts or circuit courts to the Supreme Court are expressly enumerated. Among those are the following:

"1. In any case in which the *jurisdiction* of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." (26 Stat. at L. 827.)

Under repeated decisions of this court it has been held that only cases in which the jurisdiction of the lower court as a federal court was in issue can be taken direct to this court.

In addition to the cases cited in our original brief, on pages 7 and 8, on this proposition we refer to the following cases:

Mexican Cent. R. Co. v. *Eckman,* 187 U. S. 432;
Blythe v. *Hinckley,* 173 U. S. 501;
Shoesmith v. *Boot and Shoe Co.,* 198 U. S. 582;
Fowler v. *Osgood,* 205 U. S. 535;
United States v. *Larkin,* 208 U. S. 333;

Kansas City Northwestern R. Co. v. *Zimmerman,* 210 U. S. 336;
Abrams v. *White,* 212 U. S. 538.

In *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, which is one of the leading cases on the question, the court used this language:

"The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

The language just quoted is particularly applicable to the case at bar, for here the question is whether jurisdiction can be obtained in a foreign state in any court—state or federal—by attaching cars engaged in interstate commerce or monies arising from carrying interstate commerce. That is not a question peculiar to the jurisdiction of the federal courts alone, but is one that may be raised in any court.

The following cases were dismissed for want of jurisdiction in *per curiam* opinions on the authority of the Knott case:

Shoesmith v. *Boot and Shoe Co.,* 198 U. S. 582;
Fowler v. *Osgood,* 205 U. S. 535.

In the case of *United States* v. *Larkin,* 208 U. S. 333, the United States brought a suit to forfeit certain jewels which had been fraudulently imported without payment of duty. A plea to the jurisdiction was filed on the ground that the jewels were seized in a particular locality, and that by reason of that fact the particular court had no jurisdiction. It was held that this did not raise the question of the jurisdiction of the District Court as a federal

court, and that such question could not be certified to the Supreme Court, but that the case should be appealed to the Circuit Court of Appeals. In the course of the opinion Mr. Chief Justice Fuller used this language:

"The question is presented at the threshold of the case as to whether or not the proceedings in the Circuit Court of Appeals for the Sixth Circuit, and the judgment therein rendered, were absolutely void for want of jurisdiction. If they were not, this writ of error can not be maintained, as judgments of the Circuit Courts of Appeals can not be reviewed in this way.

"Plaintiffs in error grounded their application as coming within the first of the classes of cases enumerated in section 5 of the judiciary act of 1891, c. 517, 26 Stat. 926, 827, in which appeals of writs of error may be taken directly to this court, and which reads: 'In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.'

"The word 'jurisdiction,' as used in that paragraph, is, as Judge Taft said, in *United States* v. *Swan,* 65 Fed. Rep. 647, 649, applicable to 'initial questions of the jurisdiction of a United States District or Circuit Court, whether in law or equity, over the subject-matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication;' and it has long been settled that it is the jurisdiction of the United States courts as such which is referred to. *Louisville Trust Co.* v. *Knott,* 191 U. S. 225; *Blythe* v. *Hinckley,* 173 U. S. 501; *Mexican Central Railroad Company* v. *Eckman,* 187 U. S. 429, 432. * * *

"Inasmuch as in our opinion the controversy here did not involve the jurisdiction of the District Court as a federal court, the case was appealable to the Circuit Court of Appeals, and the writ of error from this court directly can not be maintained."

The case of *Kansas City Northwestern R. Co.* v. *Zim-*

merman, 210 U. S. 336, is a case practically on all fours with the case at bar. There a suit was brought in a state court and was subsequently removed to the United States Circuit Court. In the United States Circuit Court jurisdiction was denied on the ground that the state court had no jurisdiction. On appeal to the Supreme Court of the United States the case was dismissed on the ground that the jurisdiction of the Circuit Court of the United States as a federal court was not involved, and it was held that there was, therefore, no right to take the case direct to the Supreme Court of the United States from the Circuit Court, under section 5 of the Court of Appeals Act of March 3, 1891. In the course of the opinion the court said:

"It is enough, however, that the ground on which the jurisdiction of the Circuit Court was denied did not go to its jurisdiction as a federal court. *Louisville Trust Co.* v. *Knott,* 191 U. S. 225. The certificate does not purport to enlarge the record, but simply to state what was in issue. The record shows that the jurisdiction of the Circuit Court was denied on the single ground that the state court where the proceedings started had none. Whether that contention was correct or not under *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, it had nothing to do with the jurisdiction of the federal court as such, or indeed, at all, except for the reason that the power of a secondary tribunal can go no higher than its source. We may add that the jurisdiction of the Circuit Court, if it existed, was ancillary to its possession of the *res,* if it had it, that the principles to be applied are of general application, 208 U. S. 54, and again these do not concern the jurisdiction of the federal court as such."

The above case was expressly followed in the case of *Abrams* v. *White,* 212 U. S. 558, which was dismissed for want of jurisdiction, *per curiam.*

Cases Cited by Plaintiff in Error.

None of the cases cited by the appellee in opposition to the motion to dismiss for want of jurisdiction are in point for the reason that they are entirely different cases from the cases at bar. In each of them the question of jurisdiction of the federal court as such was involved, and, of course, the appellate jurisdiction was in the Supreme Court.

The case of *Shepard* v. *Adams,* 168 U. S. 618, was a case brought in the United States District Court, and it was sought to bring the defendant into court on process issued by the District Court in pursuance of its rules for the issuance of process. The question involved was whether the process of that court as a federal court was sufficient to confer jurisdiction. The question was peculiar to the federal court, and could not have been presented in any other court.

The case of *Wetmore* v. *Rymer,* 169 U. S. 115, involved the question of whether the amount in dispute exceeded in value the sum of $2,000. That question squarely presented the issue of the jurisdiction of the Circuit Court as a federal court, and the case was, of course, properly taken to the Supreme Court.

The case of *Powers* v. *Chesapeake, etc., R. Co.,* 169 U. S. 92, does not involve any question of jurisdiction arising under the Circuit Court of Appeals Act, so far as we are able to discover.

The case of *St. Louis Cotton Compress Co.* v. *American Cotton Co.,* 125 Fed. Rep. 201, holds that all questions of jurisdiction raised in a Circuit Court, no matter whether they pertain to the jurisdiction of the court as a federal court or not, must go to the Supreme Court for review. This case was decided in 1903, before the cases in 191, 208 and 210 U. S., above referred to, were decided,

and is therefore of no weight whatever as an authority binding upon this court.

The case of *Chicago Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, relied on by plaintiff in error, is not in point for the reason that that case was instituted in the federal court, and the question of the sufficiency of service of process issued by the federal court under a federal statute was involved. There it was sought to get jurisdiction in the federal court in the first instance, and the question raised was one that could not possibly have been raised in a state court.

Plaintiff in Error's Remedy.

The jurisdiction on appeal in this case was clearly in the Circuit Court of Appeals, to which plaintiff in error took this case on writ of error to the Circuit Court. (Plaintiff in Error's Brief on Motion to Dismiss; *Davis* v. *Cleveland, etc., R. Co.*, 156 Fed. Rep. 775.) When the Circuit Court of Appeals decided the case against him, his remedy was to apply to this court for a writ of certiorari. This he failed to do, but went back and brought the case to this court on writ of error to the Circuit Court.

Conclusion.

We respectfully submit that there is no question before this court in this case which involves the jurisdiction of the Circuit Court of the United States for the Northern District of Iowa as a federal court, and for that reason that the writ of error should be dismissed.

Respectfully submitted,

William H. Farnsworth,

Frank L. Littleton,

Attorneys for Defendant in Error.

The Supreme Court of the United States.

No. 702

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, PLAINTIFF IN ERROR

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, ET AL, DEFENDANTS IN ERROR

Error to the Circuit Court of the United States for the Northern District of Iowa

STATEMENT OF THE CASE.

This action was brought by the plaintiff in error against the Cleveland, Cincinnati, Chicago and St. Louis Ry. Co., the principal defendant in error, to recover damages due the widow and next of kin of Frank E. Jandt, deceased. because of the injury and death of the deceased while a passenger upon one of the trains of the defendant in error, said injury and death being occasioned by the wrongful acts, negligence and default of the agents and employees of said defendant in error.

The injury and death occurred on the 28th day of September, A. D. 1904, while the said Frank E. Jandt was traveling on a "stockman's pass" as a shipper of horses from Chicago to Earl Park, Indiana. The injury and death occurred in the early morning, between the stations of Aroma and St. Anne on the principal defendant's line of railway, in the state of Illinois, and was due to a rear end collision; the second section of one of defendant's trains overtaking and colliding with the first section upon which the deceased was riding.

The petition of the plaintiff was filed in the District Court of Iowa in and for Woodbury County, for the May term, 1905. Said petition asked among other things for the issuance of writs of attachment and garnishment on the ground of the non-residence of the defendant, as is permissible in actions of tort under the statutes of Iowa which are hereafter quoted.

An order was made by the court to whom the petition was presented for the issuance of the writs of attachment as is provided by statute. A bond was given by the plaintiff as provided by statute, and writs of attachment and garnishment were issued, which were levied by seizing certain empty freight cars, found within the state of Iowa, belonging to the principal defendant, and found upon the tracks of, and in possession of the Chicago & Northwestern Railway Co., and other railway companies, all named as garnishee defendants in error in the record filed herein.

All of the different railway companies in whose possession cars were found were also garnished and served with notice of garnishment as provided by law, and each of the garnished com-

panies appeared at the May term and filed answers. Pleadings were filed by the plaintiff controverting the answers of each garnishee company and asking that evidence be taken upon the issues thus joined as is provided by the laws of Iowa.

The principal defendant, C., C., C. & St. L. Ry. Co., did not appear at the May term. An original notice, or summons, was served upon it at its principal place of business in the state of Ohio, as is provided by law in cases of attachment against non-residents, summoning it to appear on or before the second day of the September term of court to begin on the 5th day of September, 1905, and notices of attachment and garnishment were served upon the principal defendant in Ohio, as provided by law.

After all these proceedings had taken place in the District Court of Woodbury County, Iowa, and returns thereon had been properly made and filed, the principal defendant, as required by said original notice, on the 6th day of September, 1905, that being the day at which it was summoned to appear, did appear in the District Court of Woodbury County, Iowa, and filed its petition for removal of said cause from said State Court to the Circuit Court of the United States in and for the Northern District of Iowa. Upon the filing of said petition and bond, as required by law, the cause was by order of said District Court of Iowa regularly transferred to the Circuit Court of the United States for the Northern District of Iowa. The principal defendant, thereafter on October 3d, 1905, filed in said Circuit Court of the United States, what it denominated a special appearance, objecting to the jurisdiction of the court over the person of the defendant, and also over its property and moved to set aside and quash the service of notice, and of attachment and garnishment, which motion was supported by an affidavit attached thereto and made a part thereof, which motion and affidavit are set out in the Record at pages 20 to 24, inclusive.

By said motion and affidavit in support thereof, it was asserted and claimed that the court had no jurisdiction over the person of the defendant, and also asserted and claimed that the court had no jurisdiction over the attached property of the defend-

ant. It was also asserted and claimed that the defendant was a non-resident of the state of Iowa, had no line of railway in Iowa, and no office or agency within the state, and that the subject matter of the action, that is the claim for damages for the death of the decedent arose in the state of Illinois. It was also asserted and claimed in the second division of said motion that the garnishees were not indebted to the defendant and that they had no property in their possession except the attached freight cars, and that there was no service upon the defendant within the state and no actual seizure of the cars in the possession of the garnishees.

It was also asserted and claimed in said motion and affidavit that certain arrangements and agreements existed between the defendant and the garnishees by virtue of which the cars were, at the time of their seizure, engaged in interstate commerce, and for that reason were not subject to attachment. That the debts if any, due the defendant from the garnishees had their *situs* in Chicago, and it was claimed that the court had no jurisdiction of the attached property, or garnished funds or property involved in the garnishment proceedings, and it was moved to quash and set aside the service of the attachment and garnishment.

The plaintiff within the time fixed by the court filed a resistance to the principal defendant's alleged special appearance and motion to quash and set aside service of the attachment and garnishment, which resistance was also supported by affidavit and made a part thereof, which resistance and affidavit in support of the same are set out in the Record at pages 24 to 28, inclusive.

In said resistance the existence of any contractual relations between the defendant in error and the garnishees was denied, and in the sixth paragraph of said resistance it was asserted that "all of said cars, thus attached, were not in use at the time they were attached, but were standing empty and idle upon the tracks of the railway companies in whose possession they were found. That they were not in actual use, and were not in transit to any point, either within the state or outside the state."

It was also asserted and claimed in said resistance that the defendant's special appearance to quash the attachment was un-

warranted and unauthorized by law, and was in fact a general appearance which subjected its person to the jurisdiction of the court.

The matters and issues thus joined and presented were submitted to the court upon said pleadings and affidavits without the taking of any further evidence, and by the court taken under advisement.

On May 22d, 1906, the court rendered its decision thereon, and judgment entry was made of record quashing the attachment, discharging the attached property and discharging the garnishees, which judgment entry of May 22d is set out in full on page 39 of the Record.

On the 6th day of June, 1906, the court, on motion of the defendant, rendered further judgment, and entry of record was made thereof, quashing the service of notice on the defendant and dismissing plaintiff's cause of action as a whole as against the principal defendant, without prejudice, and rendered judgment for the costs of the action in favor of the defendant and against the plaintiff, to which judgment the plaintiff at the time duly excepted. This judgment entry of June 6th is set out in full at page 40 of the Record.

It is nowhere claimed in the principal defendant's motion to quash, etc., that the attachment and garnishment proceedings were not regular in every particular, and it appears from the record that the action was brought in the State Court of Woodbury County, Iowa, where the plaintiff was a resident and citizen, and that it was brought against the principal defendant, a foreign corporation, being a resident and citizen of the state of Ohio, and that the petition was sworn to.

The statute of Iowa, section 3495, in force at the time, provides: "An action against a non-resident of the state, when aided by an attachment, may be brought in any county of the state wherein any part of the property sought to be attached may be found, or wherein any part was situated when the action was commenced, or where the defendant is personally served in this state; and except as hereinafter provided, an action against a

resident of this state must be brought in the county of his residence,, or that in which the contract was to be performed."

Section 3878 of the Iowa statute, in force at the time, specifying the grounds for the issuance of an attachment, provides among others:

"That the defendant is a foreign corporation or acting as such."

"That he is a non-resident of the state."

In many states an attachment can not issue in an action founded on tort, but it is provided otherwise in Iowa.

Section 3882 of the Iowa Code provides:

"If the demand is not founded on contract, the original petition must be presented to some judge of the Supreme, District, or Superior Court, who shall make an allowance thereon of the amount in value of the property that may be attached."

This order was made and indorsed upon the petition. (Record, pages 5-6.)

Section 3885 of the Iowa statute, in force at the time, provides: "In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk in a penalty at least double the value of the property sought to be attached, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment."

This bond was given as shown by the recitals in the writs of attachment. Record, page 15.

Section 3889 of the statute of Iowa, in force at the time, provides: "The clerk shall issue a writ of attachment directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated."

Section 3890 of the same statute provides: "Attachments may be issued from the District Court to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession or subsequently, until sufficient property has been attached."

Section 3900 of the same statute provides: "When any

property is attached the officer making the levy shall at once give written notice thereof to the defendant, if found within the county in which the levy is made, and the fact of giving such notice or that the defendant is not found within the county, shall be shown by the officer's return; a like notice shall be given to the party in possession of the property attached."

Section 3907 of the Code of Iowa provides: "If the defendant at any time before judgment causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged, and restitution made of the property taken or the proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action."

Section 3909 of the Code of Iowa provides:

"The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, or after return of the writ, by the clerk, in a penalty at least double the value of the property sought to be released, * * * * conditioned that such property or its appraised value shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof."

Section 3896 of the Iowa Code provides:

"Property in possession of another, and of which the defendant is entitled to the immediate possession, may be seized under attachment by taking possession thereof, in the same manner as though found in the defendant's possession."

Section 3897 of the same statute provides:

"Property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment as hereinafter provided."

Section 3928 of the Code of Iowa provides:

"Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition, verified by oath to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which the claim is founded, and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof, or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has a title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect his rights."

Section 3929 of the Code of Iowa provides:

"A motion may be made to discharge the attachment or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record, that the attachment should not have issued, or should not have been levied on all, or some part of the property held."

Section 3933 of the same statute provides: "This chapter shall be liberally construed, and the plaintiff at any time when objection is made thereto shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding; and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings."

Section 3935 of the Iowa statute is relative to garnishment and provides:

"The officer serving the writ of attachment shall garnish such persons as the plaintiff may direct, as supposed debtors, or having in possession property of the principal defendant, which shall be effected by a notice served in the manner and as an original notice in civil actions, forbidding his paying any debt owing such defendant, due or to become due, and requiring him to retain pos-

session of all property of the defendant in his hands or under his control to the end that the same may be dealt with according to law, and unless answers are required to be taken as hereinafter provided, it shall cite the garnishee to appear at the first day of the next term, and answer such interrogatories as may be propounded, or he will be liable to pay any judgment which the plaintiff may obtain against the defendant."

Section 3939 of the Code of Iowa provides:

"When the plaintiff in writing directs the sheriff to take the answers of the garnishees he shall put to them the following questions:

1. Are you in any manner indebted to the defendant in this action, or do you owe him any money or property which is not yet due? If so state the particulars.

2. Have you in your possession or under your control any property, rights or credits of said defendant? If so, what is the value of the same, and state particulars?

3. Do you know of any debts owing the said defendant, or any property, rights or credits belonging to him, and now in the possession or under the control of others? If so, state particulars."

Sections 3940 and 3941 of the Code of Iowa provide:

"If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer as above provided, and he may be so required in any event if the plaintiff so notifies him.

The questions propounded to the garnishee in court may be such as are above prescribed to be asked by the sheriff and such others as the court may think proper."

Section 3945 of the same statute provides: "When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert them by pleading thereto, and an issue may be joined, which shall be tried in the usual manner, upon which trial the answer of the garnishee shall be competent testimony."

Section 3586 of the same statute provides:

"Verification shall not be required to any pleadings of a guardian, executor, prisoner in the penitentiary, *nor to any pleading controverting the answer of a garnishee.*"

Section 3948 of the same statute provides:

"The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt, or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability."

Section 3534 of the same statute provides:

"Service may be made by publication in actions brought against a non-resident of the state, or a foreign corporation, having in the state property or debts owing to such defendant sought to be taken by any of the provisional remedies, or to be appropriated in any way." And section 3537 provides that: "Actual personal service of the notice within or without the state supersedes the necessity of publication."

Section 3541 provides: *"The mode of appearance may be"* (*among others*). *"By an appearance, even though specially made, by himself or his attorney for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance special or other to object to the substance or service of the notice, shall render any further notice unnecessary."*

Rule 14 of the Practice and Pleadings in Law Actions of the United States Circuit and District Court for the Northern District of Iowa provides: "The statutes of the state of Iowa in force at the time the acts questioned or done shall, as far as may be, govern the practice and pleadings in actions at law regarding the following steps, except in cases where they are treated by the statutes of the United States."

Subdivision 1 of this rule relates to "Attachments, garnishments and proceedings to controvert the answers of garnishees."

The alleged special appearance, and "motion to quash and

set aside service" and objection to the jurisdiction of the court over the person of the defendant, and objection to the jurisdiction of the court over the attached property of the defendant, was signed by Shull & Farnsworth, attorneys, thus appearing in said Circuit Court of the United States, the garnishees by their attorneys, whose names are signed to the respective answers of the garnishees, taking no further part in said cause after filing said answers in the State Court. The matters decided being submitted upon the motion of the defendant in error and plaintiff's resistance thereto.

THE QUESTIONS INVOLVED IN THIS APPEAL WILL NATURALLY RESOLVE THEMSELVES INTO TWO.

FIRST.

DID THE DISTRICT COURT OF WOODBURY COUNTY, IOWA, AND AFTER REMOVAL, THE CIRCUIT COURT OF THE UNITED STATES, ACQUIRE JURISDICTION OF THE ATTACHED AND GARNISHED CARS AND THE GARNISHED FUNDS, BELONGING TO THE DEFENDANT AND FOUND IN THE POSSESSION OF THE GARNISHEES; BY THE LEVY OF ATTACHMENT ON SAID CARS AND THE GARNISHMENT OF SAID GARNISHEES; OR WAS THE LEVY OF SAID WRITS OF ATTACHMENT THE SEIZURE OF SAID CARS AND THE SERVICE OF SAID WRITS OF GARNISHMENT, IN EXCESS OF THE JURISDICTION OF THE COURT, FOR THE REASON THAT THE LEVY UPON THE ATTACHED AND GARNISHED PROPERTY AND FUNDS, WAS UNDER THE CIRCUMSTANCES AND CONDITIONS IN WHICH THEY WERE FOUND AND SEIZED AND GARNISHED, A "REGULATION OF COMMERCE BETWEEN THE STATES" WITHIN THE MEANING OF THE CONSTITUTION OF THE UNITED STATES, AND WAS THE COURT WITHOUT JURISDICTION OVER SUCH PROPERTY, THOUGH FOUND WITHIN THE STATE AND REGULARLY ATTACHED?

SECOND.

WAS IT PERMISSIBLE FOR THE DEFENDANT IN ERROR TO APPEAR AT ALL, SPECIALLY OR OTHERWISE, FOR THE PURPOSE OF URGING ANY OF THE MATTERS CONTAINED IN ITS MOTION,

WITHOUT SUBMITTING ITS PERSON TO THE JURISDICTION OF THE COURT UNDER THE STATUTES OF IOWA. BUT IF THIS WAS PERMISSIBLE, AND THE STATUTES OF IOWA ARE NOT BINDING ON THE COURTS OF THE UNITED STATES, WAS NOT ITS APPEARANCE AND THE FILING OF ITS SAID MOTION, SETTING UP MATTERS *de hors*, THE RECORD, AND SUPPORTED BY AFFIDAVIT, AND FOUNDING THEREON OBJECTIONS TO THE JURISDICTION OF THE COURT OVER ITS PERSON, ON ACCOUNT OF LACK OF PROCESS, AND OBJECTING TO THE JURISDICTION OF THE COURT OVER THE *res* OF THE ACTION, ITS ATTACHED PROPERTY, ON ACCOUNT OF ITS ALLEGED IMMUNITY FROM JUDICIAL PROCESS, BY REASON OF ITS INTERSTATE CHARACTER, AND MOVING TO SET ASIDE THE SERVICE OF ATTACHMENT AND GARNISHMENT, AND THUS REGAIN POSSESSION OF ITS PROPERTY, ALSO SETTING UP MATTERS AFFECTING THE SUBJECT MATTER OF THE ACTION, SETTING UP THE ALLEGED RIGHTS OF THIRD PARTIES, THE GARNISHEES, IN THE ATTACHED PROPERTY, AND DENYING THE EXISTENCE OF ANY INDEBTEDNESS FROM THE GARNISHEES TO IT, AND FINALLY OBTAINING ON ITS OWN MOTION A DISMISSAL OF THE ACTION AND A JUDGMENT IN ITS FAVOR, A FULL APPEARANCE IN THE ACTION SUCH AS TO GIVE THE COURT COMPLETE JURISDICTION OF ITS PERSON, REGARDLESS OF THE SEIZURE OF THE ATTACHED PROPERTY?

SPECIFICATIONS OF ERROR.

The plaintiff in error sets forth the following errors committed by the court below and intended to be urged here:

FIRST.

The court erred in entering the judgment of May 22d, 1906, quashing the attachment and discharging the garnishees, to which ruling of the court the plaintiff in error at the time duly excepted.

This error is preserved and assigned as error in the assignment of errors. (Record, pages 45-46.)

Said order and judgment is found on page 39 of the Record and is as follows:

"And now, to-wit, May 22d, A. D. 1906, the motion by defendant to quash the attachment and discharge garnishees thereunder, having been submitted heretofore to the court and taken under advisement, and the court now being fully advised in the premises, finds and so orders, that said motion should be sustained, to which ruling of the court the plaintiff at the time duly excepts."

The court erred in entering this judgment because:

1. The question of whether or not each of the cars levied upon under the writs of attachment, and also held by the notices of garnishment, as well as the garnished funds, were at the time of the attachment, engaged in interstate commerce or were the subjects of interstate commerce, is a question of fact, which, under the issues joined, particularly between the plaintiff and the garnishees, the plaintiff has a right to submit evidence, and have such matters determined in the usual way, and not by a summary motion.

2. The pleadings and affidavits filed in the cause show conclusively that the cars in question when attached, as well as the garnished funds, were not as a matter of fact engaged in interstate commerce, nor subjects of interstate commerce.

3. Even though the cars in question had been used as instruments of interstate commerce, or later they might be used as instruments of interstate commerce, still their attachment was not a "regulation of commerce between the states" the said cars were subject to attachment, they were actually attached, and were in fact subject to seizure the same as the property of any other non-resident.

4. Under the record, including the answers of the garnishees, and the pleadings of the plaintiff controverting the same, issues were joined between the plaintiff and each of the garnishees in the District Court of Woodbury County, Iowa, as is provided by the statutes of Iowa, upon which the plaintiff was entitled to introduce evidence, and have a trial thereon in the regular way as provided by law, and the rights of the plaintiff as against each of said garnishees were not, and could not be, raised in any

manner on the hearing of the defendant's motion in the Circuit Court of the United States.

SECOND SPECIFICATION OF ERROR.

The court erred in rendering the judgment of June 6th, A. D. 1906, quashing the service of the notice upon the principal defendant, and dismissing said cause of action against said principal defendant, and in entering judgment against the plaintiff for costs of the action, to all of which the plaintiff at the time duly excepted.

This error is preserved and assigned as error in the assignment of error. (Record, page 46.) Said order and judgment is as follows (Record, page 40):

"And now on this 6th day of June, A. D. 1906, this cause coming before the court on *motion of the defendant* to quash the service of notice upon the defendant, and the court being duly advised therein, finds that said motion should be sustained, to which ruling plaintiff excepts. *And accordingly,* it is the judgment and order of the court that this cause of action be, and the same is, hereby dismissed, without prejudice to plaintiff's further right of action, and that defendant have and recover of and from Charles A. Davis, executor of the estate of Frank E. Jandt, deceased, the costs of this action taxed at $129.70, and that execution issue therefor, to all of which plaintiff at the time duly excepted."

The court erred in entering this judgment:

1. Because the procedure against, and service of the notice upon the defendant was regular and as provided by law, and the defendant in *appearing and invoking t*he jurisdiction of the court to determine questions of fact relating to the attachment of the cars in question, and the garnishment of the several garnishees, subjected the person of the defendant and the cause of action as a whole to the jurisdiction of the court and the plaintiff is therefore entitled to have the cause tried as a whole in the said Circuit Court of the United States.

2. Because the attached property was subject to levy, and

the payment of the debts of its owner the same as the property of any other non-resident. But independent of the question of whether or not it was subject to attachment, the court having assumed jurisdiction to determine that question at the invocation of the defendant, necessarily took jurisdiction of the defendant, appearing to raise that question and obtain a release of its property, and of the case as a whole, and thereby the plaintiff is entitled to have the case as a whole tried and determined in said Circuit Court of the United States.

3. The alleged special appearance of the defendant was not confined to the sole question of the jurisdiction of the court over its person; but aside from that, it objected to the jurisdiction of the court over the *res* of the action, that is the attached cars, which had been seized within the jurisdiction of the court under valid and regular process, and also contained a motion to quash that attachment based on matters *de hors* the record, which motion contained matters going to the jurisdiction of the court over the subject matter of the action. The defendant thus gave the court jurisdiction over its person, as in all jurisdictions a special appearance can never serve a dual or triple purpose, but is only allowed for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant.

4. The property and funds of the principal defendant in possession of the several garnishees were subject to garnishment and this question of fact being submitted to the court under the defendant's motion, subjected the person of the defendant, its attached property and the funds in question, to the general jurisdiction of the court, and entitled the plaintiff in error to the submission, hearing and determination of the issues in the "usual manner."

5. The plaintiff had a right to a hearing on the issues joined between him and the several garnishees, and was entitled to a regular and orderly trial of these issues by jury, if desired. This right the principal defendant could not deprive the plaintiff of by filing a so-called special appearance, accompanied by a summary motion tendering the same issues of fact already

joined between the plaintiff and garnishees, and obtaining a decision thereon and a discharge of the garnishees without a trial.

6. The dismissal of the action as against the plaintiff, and the rendition of a money judgment against him in favor of the defendant, which was done on motion of the defendant, could only be done after the court had full jurisdiction of the persons of the parties, a judgment can not be obtained without a full appearance, and this dismissal and judgment was error. The court having obtained jurisdiction of the parties should have set the cause for trial.

THIRD.

The court erred in rendering the judgment of May 22d, 1906, quashing the attachment and discharging the garnishees thereunder; and in rendering the judgment of June 6th, 1906, quashing the service of the notice upon the defendant, dismissing the case as to the principal defendant and taxing the costs to the plaintiff, to all of which the plaintiff at the time duly excepted.

This error is preserved and assigned as error in the assignment of errors. Record, page 47.

The entering of both of these judgments was erroneous because the property of the defendant was within the jurisdiction of the court, was subject to attachment, had been rightfully and legally attached, and was liable for the payment of the debts of its owner. The principal defendant by appearing to object to the service of the original notice upon it, and also asking for other relief, affirmative in its character, made a general appearance and thus subjected its person to the jurisdiction of the court.

BRIEF AND POINTS AND AUTHORITIES.

DIVISION I.

WAS THE PROPERTY IN QUESTION, THE CARS AND FUNDS, SUBJECT TO ATTACHMENT AND GARNISHMENT?

1. The rolling stock of railway corporations is personal property, over which they have the power of alienation, and is

subject to seizure, when not in actual use, by attachment or execution, or other valid process the same as other personal property.

Boston C. M. Ry. Co. *vs.* Gilmore, 37 N. H., 410.
Coe *vs.* Col. Piq. & I. R. R. Co., 10 Ohio St., 372.
Louisville & New Albany Ry. Co. *vs.* Boney, 117 Ind., 501.
Buffalo Coal Co. *vs.* Rochester & S. L. Ry. Co., 8th Weekly Notes Cases, 126 (Penn.)
Williamson *vs.* N. J. S. R. Co., 29 N. J. Eq., 311.
Randall *vs.* Elwell, 52 N. Y., 521.
Potter ~~Porter~~ *vs.* Hall, 20 Mass., 368.
Hall *vs.* Carey, 140 Mass., 131.
~~Potter vs. Hall, 3 Pickering, 226.~~
Johnson *vs.* Southern Pacific, 196 U. S., 1.
Elliott on Railroads, Vol. 2, page 587.
Drake on Attachment, 7th Ed., Section 252 A.
Cyc. Law and Procedure, Vol. 4, page 557.

Steamships and other vessels are just as much instruments of interstate commerce, and just as much subject to the Acts of Congress as are railroad cars, yet this court, and other courts, have held that, though they were engaged in interstate commerce, that fact did not prevent their seizure under attachment or other process issued by authority of a State Court, and that their sequestration under state laws was not a "regulation of commerce between the states," even though such seizure might "prevent or obstruct a voyage of an interstate character."

Iroquois Transportation Co. *vs.* De Laney, 205 U. S., 354. (The Winnebago.)
Johnson *vs.* Chicago & Pacific Elevator Co., 119 U. S., 388.
The Robert Dollar, 115 Federal, 218.
Ex-Parte McNeil, 13 Wall., 236.
Menich *vs.* Tehauntepec Co., 16 La. Ann., 46.
Sibley *vs.* Ferris, 22 La. Ann., 163.
Haberle *vs.* Barringer, 29 La. Ann., 410.
Sherlock *vs.* Alling, 93 U. S., 99.

Congress has passed laws inflicting severe penalties upon any one who interferes with the transportation of the United States mail, yet it has been held that a boat owned by a mail contractor may be attached if the mail be not on the boat at the time. It is not enough that in consequence of the seizure the contractor is put to inconvenience, and that there ensued a delay in the mail. The seizure itself must be a wilful obstruction.

Parker *vs.* Porter, 6 La., 169.
4 Cyc. Law & Procedure, page 969.
Waples on Attachment, Section 723.
Briggs *vs.* Strange, 17 Mass., 405.

2. The fact that chattels belonging to a non-resident, or a resident either, were when seized upon attachment execution or replevin, subjects of interstate commerce or were in transit from one state to another, has never been regarded as preventing their actual seizure if within the jurisdiction of the court issuing the process, and they can even be held by garnishment of the carrier if not too late to arrest the shipment.

Morrell *vs.* Buckley, 20 N. J. L., 607.
Santa Fe Ry. Co. *vs.* Bossut, 19 Am. & Eng. Ry. Cases, 683.
Am. & Eng. Ency. of Law, Vol. 5, page 239.
Waples on Attachment, 2d Ed., Section 449.
Moore on Carriers, pages 34, 229, 232.
Adams *vs.* Scott, 104 Mass., 164.
Landa *vs.* Holck, 129 Mo., 663.

The Robert Dollar, 115 Federal, 218, at page 222.

3. The cars in question when attached were not engaged in interstate commerce. They were, with one exception, standing "empty and idle" upon the tracks of the garnishees, they had reached their destination and had been unloaded. The garnishees were not before the court asserting any desire or intention to use them for any purpose. There was no evidence of any intention to reload them. The courts of the state in which they were found had complete jurisdiction over them for the purpose of enforcing

the lien of attachment, and they were subject to state laws. Record, pages 25-26-27.

Norfolk & Western R. R. Co. *vs.* Commonwealth, 93 Va., 749.

4. The record fails to establish any contractual relations between the principal defendant and the garnishees, the alleged contract is not in the Record. Its existence is asserted on the one hand, and denied upon the other. But whether or not there is such a contract does not concern this case, for if any such contract existed giving the garnishees a right or interest in, or a lien upon the attached cars, it was for those garnishees to affirmatively assert their interests; this could not be done by an answer as garnishee. The statutes heretofore quoted at page 8 hereof relating to answers of garnishees do not so provide, but could only be done by presenting a verified petition to the court as provided in section 3928 of the Code of Iowa, hereinbefore quoted at page. hereof. This they have not done, neither have they asserted any lien upon, right or interest in the cars in their answers as garnishees; but in either case the rights of the garnishees could not be considered in the motion submitted to the court. Their answers had been controverted and the plaintiff in error was entitled to a regular trial of the issues thus made. The defendant in error in its motion under its alleged special appearance, sought to raise the rights of the garnishees under the alleged contract, and in that motion sought to set up defenses which were alone personal to the garnishees. *This the defendant could not do.* The court below could only consider in that hearing the matters contained in the defendant's motion and the resistance thereto, and so far as the matters contained in the motion related to the rights of the garnishees to use the attached property, or their rights under any contract, or arrangement, or any defense which the garnishees might have to the garnishment, these were personal to the garnishees and could not be raised by the defendant in error, and to that extent at least the motion was mere surplusage.

Tidrick *vs.* Sulgrove, 38 Ia., 339.

Foushee *vs.* Owen, 122 N. C., 360.

Exchange Bank *vs.* Clement, 109 Ala., 270.

Weber *vs.* Mick, 131 Ill., 520.

Langden *vs.* Conklin, 10 Ohio St., 439.

"And if the allegations of such a motion, so filed by a defendant, are controverted or denied by the plaintiff, the defendant would have to proceed in a more formal manner to try the right to hold the property on the writ."

Rausch *vs.* Moore, 48 Ia., 611.

Although it is asserted that the garnishees had the right, or privilege, of reloading the cars, it is nowhere claimed that there was any intention , purpose or desire on the part of the garnishees to exercise that right or privilege.

5. The only authority found in the Code of Iowa permitting the defendant in error to file a motion to discharge the attachment is found in Section 3929, heretofore quoted, which provides that it may be discharged for any ground making it *"apparent of record* that the attachment should not have issued, or should not have been levied upon all or some part of the property held."

Under this statute the Iowa courts have held that the exemption "should be made clear and entirely satisfactory, otherwise the party should be left to other and ordinary means for testing the liability of the property to seizure under the writ, and that rights of third parties can not be considered under such a motion, but they must proceed by intervention under Section 3928," which provides that "Any person other than the defendant may before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition verified by oath to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which the claim is founded, and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may empanel a jury to inquire into the facts."

McLaren *vs.* Hall, 26 Iowa, 297.
Tidrick *vs.* Sulgrove, 38 Iowa, 339.
Williams *vs.* Walker, 11 Iowa, 77.

Under the guise of a special appearance the defendant in error by its motion sought to accomplish, in its own behalf, that which the Code of Iowa provides shall be done by a "suitable pleading" as provided in section 3948 of the Iowa Code, which is as follows:

"The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or property with which it is sought to charge the garnishee, is exempt from execution or for any other reason is not liable for plaintiff's claims, and if issue thereon be joined by the plaintiff it shall be tried with the issues as to the garnishee's liability."

And on behalf of the garnishees in the same motion, it sought to accomplish that which can alone be done under the above quoted section 3928. If it is permissible for the defendant in any manner to raise any issue in the garnishment proceedings, it cannot be done by motion, but must be done by a pleading as provided in said section 3948.

Again, it has been held by the courts of Iowa that "if the statements of fact contained in the motion to discharge an attachment *be denied,* the defendant would have to proceed in a more formal manner to try the right to hold the property on the writ."

Rausch *vs.* Moore, 48 Iowa, 611.

6. There is no rule of law or statute requiring that any railway company shall receive shipments from connecting lines and transfer them in the same cars in which they are tendered; nor are railway companies bound by any rule of law or statute to allow their cars to go beyond their own terminals, and in practice we know that railway companies often refuse to transport freight in any but their own cars, or to allow their cars to be used beyond their own terminals.

The Federal Statutes, Sec. 5258, authorizing through ship-

ments are *permissive only* and impose no affirmative duties upon railway companies.

Am. & Eng. Encly. of Law, Vol. 6, page 609.
Kentucky Bridge Co. *vs.* Louisville, 37 Fed., 567.
Moore on Carriers, 453, 454.

7. In order that a state law, or the action of state authorities under such law should be construed a "regulation of commerce between the states," the operation of such law, or the action of such state authorities must be a *direct interference* or regulation, and directly and substantially hurtful to such commerce, not a mere incidental or casual interruption or regulation, or remotely hurtful.

Sherlock *vs.* Alling, 93 U. S., 99.
L. & N. Ry. Co. *vs.* Ky., 183 U. S., 503.
N. Y. L. E. & W. R. R. Co. *vs.* Penn., 158 U. S., 431.
Henderson Bridge Co. *vs.* Kentucky, 166 U. S., 150.
L. & N. Ry. Co. *vs.* Kentucky, 161 U. S., 677.
Nashville Ry. Co. *vs.* Alabama, 128 U. S., 96.

8. The cases upon which defendant in error rely, upon this branch of the case; Wall *vs.* Norfolk and Western Ry. Co., 44 S. E. (W. Va.), 294, and Conery *vs.* Q. O. & K. Ry. Co., 99 N. W., (Minn, 365) are not similar in their facts to the case at bar. Their reasoning is based upon a misapprehension of the Federal statutes, and the grounds upon which the decision is based, especially the latter case, are opposed to all respectable authority.

SECOND.

WERE THE GARNISHED FUNDS, IF ANY, IN THE HANDS OF THE VARIOUS GARNISHEES SUBJECT TO GARNISHMENT?

1. *Debts due a principal defendant from a garnishee are subject to garnishment wherever the garnishee could be sued by the defendant.*

The record shows that all of the garnishees were engaged in operating lines of railway in Iowa and one of them the Chi-

cago, Rock Island & Pacific *is an Iowa corporation.* They themselves then could all be sued in the courts of Iowa.

Section 3497 of the Code of Iowa provides: "An action may be brought against any railway corporation, the owner of stages or other line of coaches or car, express, canal, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated."

Section 3529 of the Code of Iowa further provides: "If the action is against any corporation or person owning or operating any railway, canal or any telegraph, telephone, stage coach or car line, or against any express companies, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person wherever found, or upon any station, ticket or other agent or person transacting the business thereof, or selling tickets therefor in the county where the action is brought, if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county."

There is no inhibition in the laws of Iowa preventing suits by a non-resident plaintiff in the courts of Iowa.

"A debtor may be charged as garnishee of his creditor, without regard to the illusive theories as to the *situs* of the debt, in any jurisdiction in which an action might have been brought by such creditor against the debtor, though personal service cannot be had upon the defendant."

"Nor is it material that the debt was not made payable in the state where the attachment proceedings were instituted."

"Nor that the garnishee's contract with the defendant is to pay the money in another state or country than that in which the attachment is pending."

Am. & Eng. Encly. of Law, Vol. 14, pages 804, 816.
Harvey *vs.* G. N. Ry. Co., 50 Minn., 405.
Drake on Attachment, 7th Ed., Sec. 597.
Mooney *vs.* Buford, 72 Fed., (C. C. A.) 32.
Mooney *vs.* U. P. R. R. Co., 60 Ia., 346.

German Bank *vs.* Ins. Co., 83 Ia., 491.
National Fire Ins. Co., *vs.* Chambers, 53 N. J. Eq., 468.
Blake *vs.* Williams, 6 Pick., 286.
Minor on Conflict of Laws, Sec. 125.
Wyeth Hdw. Co. *vs.* Lang, 127 Mo., 242.
Cross *vs.* Brown, 19 R. I., 220.
Harris *vs.* Balk, 198 U. S. 215.
Newfielder *vs.* Ger. Am. Ins. Co., 6 Wash., 336.
M. & O. R. R. Co. *vs.* Barnhill, 90 Tenn., 349.
Smith *vs.* Tabor, 16 Tex. Civil Appeals, 154.
Pomeroy *vs.* Rand, 157 Ill., 176.
Cousins *vs.* Lovejoy, 83 Me., 467.
Fithian *vs.* Ry. Co., 31 Pa. St., 114.
Barr *vs.* King, 96 Pa. St., 485.
Blake *vs.* Huntington, 129 Mass., 444.
Cahoon *vs.* Morgan, 38 Vt., 236.
Towle *vs.* Wilder, 51 Vt., 622.
Mashussuck Felt Mill *vs.* Blanding, 17 R. I., 297.

2. These garnished funds are not shown to be the product of receipts for compensation for the carriage of interstate commerce, and even if they were, that would not *scantify* them so as to make them immune from garnishment any more than defendant's bank account in Cincinnati would be so immune. The garnishment of these funds would in no sense be a "regulation of commerce between the states."

DIVISION II.

FIRST.

THE STATUTES OF IOWA INHIBIT SPECIAL APPEARANCES.

Section 3541 of the Code of Iowa provides:

"The mode of appearance may be * * *

"3. By an appearance even though specially made for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice, and an ap-

pearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary."

Bank *vs.* Vann, 12 Ia., 523.

Rahn *vs.* Greer, 37 Ia., 627.

Lesure Lumber Co. *vs.* Ins. Co., 101 Ia., 514.

Moffitt *vs.* Chicago Chronicle Co., 107 Ia., 412.

Blondel *vs.* Ohlman, 109 N. W.., 806 (Ia.)

Sam *vs.* Hockstadler, 76 Texas, 162.

Lucas *vs.* Patton, 107 S. W., (Tex.) 1143.

This section of the Iowa Code is binding upon Federal Courts held within that state.

Section 914 of the Revised Statutes of the United States provides: "The practice, pleadings, forms and modes of proceeding in civil causes shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the states within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

"This statute is peremptory and whatever belongs to the three categories of practice, pleadings and forms of proceeding must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon the particular subject and prescribed the rule."

Amy *vs.* Watertown, 130 U. S., 304.

2. All cases cited by the learned court below and relied upon by the defendant in error where a special appearance has been allowed by this court in a jurisdiction where in the state laws prohibit the same, are cases where to refuse the defendant the right to appear for a special purpose would be to nullify an Act of Congress relating to the practice and forms of proceeding in the courts of the United States, and hence the state law must yield to the superior law of Congress governing the practice of the United States courts.

Southern Pacific Ry. Co. *vs.* Denton, 146 U. S., 208, 210.

Galveston, Etc., Ry. Co. *vs.* Gonzales, 151 U. S., 496.

Mexican Central Ry. Co., *vs.* Pinkney, 149 U. S., 194.

The case at bar differs from the above cases in that they were all commenced in the United States Court, while this case was removed from the State Court to the United States Court. *A defendant gains nothing by removal.*

3. There is a wide distinction between a special appearance *eo nomine*, as defined by the rules of the common law, *to* object to process over the person, such as is attempted to be made in the case at bar; and an appearance made for a particular or special purpose, whether special or general, to raise the question of statutory bar, or personal privilege which forbids the court to proceed with the cause against the person. The latter objection can be raised by any appearance, either special or general.

Spurrier *vs.* Wirtner, 48 Ia., 486.
Cibula *vs.* Pitts, 48 Ia., 528.
Murray *vs.* Wilcox, 122 Ia., 188.
Southern Pacific Ry. Co. *vs.* Denton, 146 U. S., 208.

SECOND.

EVEN IF IT SHOULD BE HELD THAT THE IOWA STATUTES, REGULATING PRACTICE IN THE MATTER OF APPEARANCE, WERE NOT BY VIRTUE OF SECTION 914, REVISED STATUTES OF THE UNITED STATES, BINDING IN THIS CASE UPON THE CIRCUIT COURT IN A CASE REMOVED FROM THE STATE COURT; WE NEVERTHELESS URGE THAT THE APPEARANCE MADE BY THE DEFENDANT IN ERROR, AND THE MATTERS CONTAINED IN ITS MOTION AND AFFIDAVIT, FILED UNDER SUCH APPEARANCE, CONSTITUTED A GENERAL APPEARANCE, AND WAS IN NO MANNER SPECIAL AS TESTED BY THE LAW AND RULES OF PRACTICE OBTAINING IN JURISDICTIONS WHERE SPECIAL APPEARANCES ARE PERMISSIBLE.

1. A special appearance is never allowable except for the single purpose of objecting to the jurisdiction of the court over the *person* of the defendant.

3. Cyc. Law & Procedure, pages 502, 511, 527.

2. Encly. of Pleading & Practice, 620, 621, 625.
Elliott *vs.* Lawhead, 43 Ohio St., 171.
Fitzgerald & Mallory Construction Co. *vs.* Fitzgerald, 137 U. S., 98.
Welch *vs.* Ayers, 61 N. W., 635 (Neb.)
Abbott *vs.* Semple, 25 Ill., 91.
State *vs.* Buck, 15 So. Rep., 531 (La.)
Mahr *vs.* U. P. R. Co., 140 Federal, 921.
Perrine *vs.* Knights Templars, 101 N. W., 1017 (Neb.)
Same case, 98 N. W., 481.
Dudley *vs.* White, 44 Fla., 264.
Ray *vs.* Trice, 48 Fla., 297.
Reed *vs.* Chilson, 142 N. Y., 152.
Lowe *vs.* Stringham, 14 Wis., 222.
Rogers *vs.* McCord, Etc., 91 Pac. Rep., 864 (Okl.)
Wabash Western Ry. *vs.* Brow, 164 U. S., 271.

2. The alleged special appearance in this case not only objected to the jurisdiction of the court over the *person* of the defendant, on account of lack of service of notice within the state, but also objected to the jurisdiction of the court in *rem* over the attached property of the defendant found within the jurisdiction of the court; not for any irregularity in the process of attachment, issuance or levy thereof, but on the ground of its alleged immunity from judicial process, which was not a jurisdictional question. The defendant in error attempted to attack the jurisdiction of the court *in personam,* and in *rem* in the same motion. We find no authority for a special appearance for a *dual purpose.* It must go alone to the jurisdiction of the court over the person of the defendant.

3. The alleged special appearance, and motion and affidavit under it contain many matters which can not be urged by a special appearance, and many allegations of fact, which do not relate to jurisdiction. The defendant moved to quash and set aside the service of the attachment and garnishment and the motion and affidavit call the court's attention to matters out-

side the record, and invoke the jurisdiction of the court to pass upon and determine questions of fact relating to the *status* of its property regularly attached and within the jurisdiction of the court. Thus calling upon the court to grant it affirmative relief, which could only be done after the court had full jurisdiction of the person of the parties and the *res* of the action as well as the subject matter.

The alleged special appearance contains allegations of fact challenging the jurisdiction of the court over the subject matter of the action. That it is one for "wrongful causing the death of plaintiff's decedent while a passenger in one of defendant's trains in the state of Illinois."

Mahr *vs.* U. P. R. Co., 140 Fed, 921.

It also sets up the rights of the garnishees in the attached property and garnished funds, thus going to the merits of the issues joined between the plaintiff and the garnishees, by asserting that the garnishees had certain interests in the cars which gave them the rights of a bailee for hire, and asserting that no indebtedness existed from the garnishees to the defendant, and if any did exist it was payable in Illinois. These were all matters personal to the garnishees and could not be set up by the defendant even by a motion under a general appearance, and necessarily rendered its appearance general.

Foushee *vs.* Owen, 122 N. C., 360.

Tidrick *vs.* Sulgrove, 38 Ia., 339.

4. AN APPEARANCE TO A WRIT OF ATTACHMENT IS A GENERAL APPEARANCE, ESPECIALLY WHERE IT IS COUPLED WITH OBJECTIONS REQUIRING EVIDENCE TO SUSTAIN, OR OBJECTIONS TO THE JURISDICTION *in rem*, OR MOVES TO QUASH FOR MATTERS NOT GOING TO IRREGULARITY IN PROCESS OR SERVICE THEREOF, AND IS SOUGHT TO BE SUSTAINED BY MATTERS *de hors* THE RECORD.

Waples on Attachment, 2d Ed., Sec. 702, 658.

Wood *vs.* Young, 38 Ia., 102.

Whiting *vs.* Budd, 5 Mo., 443.

Evans *vs.* King, 7 Mo., 411.

Withers *vs.* Rogers, 24 Mo., 340.
Greenwell *vs.* Greenwell, 26 Kan., 530.
Gorham *vs.* Tanquery, 58 Kan, 233.
Burnham *vs.* Lewis, 65 Kan, 481.
Frazier *vs.* Douglas, 48 Pac., 36 (Kan.)
Nicholas & Shepard Co. *vs.* Baker, 13 Okla., 1.
Ray *vs.* Mercantile Co., 26 Pac., 996.
Duncan *vs.* Wycliffe, 4 Met., (Ky.) 118.
Raymond *vs.* Nix, 49 Pac., 1110.
Gann *vs.* Beasly, 59 N. W., 714 (N. D.)
Cooper *vs.* Reynolds, 10 Wall., 308.

5. Although the defendant in error did not ask for a dismissal of the action in its written motion filed under its alleged special appearance, the record discloses that on June 6th, a second judgment was rendered on motion of the defendant, quashing the service of notice on the defendant, dismissing plaintiff's cause of action and rendering judgment in its favor and against the plaintiff for $129.70.

This was error and is a general appearance.

Teater *vs.* King, 35 Wash., 138.
Welch *vs.* Ayers, etal, 61 N. W., 371 (Neb.)
Bucklin *vs.* Strickler, 32 Neb., 602.
Everett *vs.* Wilson, 83 Pac., 211 (Col.)

BRIEF OF THE ARGUMENT.

DIVISION I.

We want to call the attention of this court to some erroneous assumptions of fact contained in the opinion of the court below.

It is said: "It very clearly appears from the affidavit in support of the motion to quash the attachment that at the time the cars of the defendant were delivered to the several garnishees, there were existing agreements between the defendant and said garnishees for the continuous carriage of freight from one state to and through other states to its destination on their said lines of railroad; that said cars were severally loaded with freight at

places on defendant's road outside of the state of Iowa consigned to places on the lines of the respective garnishees in Iowa and Nebraska and were delivered by the defendant outside the state of Iowa to said several garnishees pursuant to said agreements, to be carried by them to the destination of said freight, there to be unloaded, and as soon as it could reasonably be done, returned to the defendant, either empty or reloaded with freight to be carried in the usual course of business in returning said cars." Record, page 34.

Now while these general, vague and indefinite allegations do appear in the motion of the principal defendant, the affidavit in support thereof, and in the answers of the several garnishees, (all apparently dictated by the same hand) it is a significant fact that nowhere, either in the answers of the garnishees or in defendant's motion to quash, is this elusive thing, sometimes called a "contract," sometimes "an agreement," and sometimes called "an arrangement" set up in *hacc verba,* nor claimed to be in writing, so we must conclude that no written evidence of it exists. No such contract was produced, though its production was challenged.

This affidavit is made by one Higgins, who styles himself "Auditor of Disbursements of the Defendant Company." *It does not show that he has any personal knowledge of the facts sworn to, or that by virtue of his office he has any means of knowledge.* (Record, page 23.) It does not pretend to show from what point said cars were consigned, nor to what point consigned. It does not pretend to state the condition of the cars when attached, whether loaded or empty, whether in transit or empty and idle. Nor does it claim that the garnished companies desired or intended to use the cars for reloading under their alleged "agreements and arrangements." It does not set up any agreement which is shown to be one involving mutual duties and obligations and enforceable in law, except that the garnishees should return to the defendant its property. (Record, page 21.)

Yet the learned Circuit judge says that an agreement was clearly established such as gave others a right in the defendant's

property superior to the right of plaintiff to subject it to the payment of the defendant's debts.

But these facts were not "established," they were all denied in the resistance to this motion, filed by the plaintiff in error, and the affidavit in support thereof sworn to by Wilbur Owen, who testified that he was present when the cars were attached, knew their condition when attached, knew that there was no intention to use them by the garishees, had investigated the alleged agreement, had found that no such agreement existed and pointed out to the court what the real arrangement between the garnishees and defendant was at page 26 of the Record, as follows:

"Ninth. That the alleged right set up by the principal defendant by which it claims the other railroad companies named in its motion to quash have the right to use the cars actually attached, is simply a license or privilege not resting upon contract, but depending upon custom which custom of returning cars, loaded or unloaded, to the principal defendant depends upon the convenience of the other companies and that no contractual relations exist between the principal defendant and said other railway companies in reference thereto."

A careful analysis of the answers of the garnishees and of the affidavit of Mr. Higgins shows that no more than this is claimed. Everyone knows that if these companies had contracts in regard to the use of their cars that they would be in writing.

But granting everything claimed by Mr. Higgins in his affidavit, it still appears by the affidavit of Mr. Owen, (Record, pages 26, 27) and is nowhere *disputed* that these cars had arrived at their destination, and, except one, had been unloaded by the consignees; they had then performed their mission of interstate traffic, and were "empty and idle," awaiting return. It is not claimed by any one that the garnishees desired or intended to use them for any purpose or to so exercise their right or privilege. The most that is claimed is that they had the right to reload them if they wanted to, but no one claims that they wanted to. How, then, would their attachment in such a situation, under such conditions, be a "regulation of commerce between the

states," or contrary to public policy, or interfere with the rights of the garnishees?

That the cars had arrived at their destination and were empty upon the tracks of the garnishees and that no intention existed to reload them is affirmatively shown by the resistance of the plaintiff in error, and is not denied by the garnishees nor by the defendant in error, and is practically conceded by the learned court below.

This resistance filed by the plaintiff in error, supported by affidavit, taking issue with and denying the allegations of fact in the motion of defendant in error, was wholly ignored and overlooked by the learned Circuit Court in its opinion. No objection was made to it in the court below. It was certainly competent to resist a motion to quash an attachment by counter affidavits, and we think that the resistance of the plaintiff in error was entitled to as much consideration as the motion of the defendant, especially as the resistance was sworn to by one who had personal knowledge of what he affirmed.

The learned Circuit Court is again in error when at page 37 of the Record it says: "The burden imposed by such legislation is slight as compared with that which would authorize the seizure upon attachment of an entire train of cars or any part thereof, *carrying freight* from one state to or through another."

The record discloses no such state of facts. No such claim was ever made by the defendant in error, and we reiterate that when seized the cars were no part of any train, but were empty and idle and no intention existed upon the part of any one to put them into immediate use.

The court below is again in serious error when it says, at page 31 of the Record: "No evidence is submitted by the plaintiff in opposition to the motion of the defendant to quash the attachments, *or in support of the pleadings controverting the answers of the several garnishees,* and the matters are submitted upon the record including such motion and the admission of the pleadings."

The plaintiff in error submitted as much evidence in opposi-

tion to the motion of the defendant in error as did it in support thereof. It is surely competent to oppose a motion setting up allegations of fact, by a resistance denying these allegations and setting up new facts which also go to the merits of the motion. This was done in this case. The existence of the alleged contract was denied and the defendant challenged to produce any such contract, and the personal knowledge of the facts sworn to is surely as apparent in the resistance as in the motion. Again has the court overlooked and ignored the matters contained in the resistance. Record, pages 24, 28.

The court says that the plaintiff in error "submitted no evidence in support of its pleadings controverting the answers of the several garnishees."

The plaintiff in error had joined issue with the several garnishees and had a right to a trial of those issues either in the District Court of Woodbury County, or the Circuit Court of the United States after removal, in the "usual manner" as is provided by Section 3945 of the Code of Iowa heretofore quoted. This trial the learned Circuit Court deprived the plaintiff in error of by dismissing the garnishees and dismissing the action.

The court seems to treat as of some significance the fact that the pleadings of the plaintiff in error controverting the answers of the garnishees were not under oath . (Record, page 31.) These pleadings were filed in the District Court of Woodbury County, Iowa, and were not required to be sworn to under Section 3586 of the Code of Iowa, which provides that "verification shall not be required to any pleadings * * * nor to any pleading controverting the answer of a garnishee."

In view of the record we can not understand what the learned Circuit Court means when it says that "no evidence was introduced to oppose the motion of the defendant in error nor to controvert the answers of the garnishees." It was certainly not proper to submit evidence as to the issues joined between the plaintiff in error and the garnishees upon the hearing of the summary motion filed by the defendant in error under the guise of a special appearance.

DID THE COURT FAIL TO ACQUIRE JURISDICTION OF THE PROPERTY OF THE DEFENDANT IN ERROR BY THE ATTACHMENT OF ITS CARS, AND THE GARNISHMENT OF THE VARIOUS GARNISHEES, AND WAS SUCH PROPERTY OF THE DEFENDANT IN ERROR IMMUNE FROM JUDICIAL PROCESS?

It will not be disputed that each state has the right to confer jurisdiction upon its courts over all property within its territorial limits, whether it belongs to a resident or non-resident, and to provide for its sequestration by process to answer the demands of the owner's creditors.

It is claimed, however, in this case that these cars attached in the case at bar possessed a peculiar sanctity, exempting them from judicial seizure because they were instruments of interstate commerce.

All property of the modern railway is used more or less in interstate commerce. If a creditor cannot levy upon it, how would he be able to enforce payment of his debt? All property that is subject to execution is also subject to attachment.

4 Cyc. Law & Procedure, 554.

If these cars could not be attached in Iowa, to satisfy the demands of Iowa creditors, they could not be levied upon in Ohio to satisfy the judgment of an Ohio creditor; for they are just as much engaged in interstate commerce, and just as necessary to enable their owner to discharge any duty to the public at one end of the route as at the other, and a creditor of a railway corporation could never collect his debt if he could not levy upon its tangible property.

THE FALLACY WHICH LIES AT THE BOTTOM OF THE REASONING OF THE COURT BELOW, AND THE INHERENT WEAKNESS OF THE CONTENTION OF THE DEFENDANT IN ERROR, IS IN THE CONFUSION OF QUESTIONS OF "REGULATION OF COMMERCE BETWEEN THE STATES" WITH QUESTIONS OF "PUBLIC POLICY," AND PUTS THE GENERAL, UNCERTAIN AND VARIABLE DUTY, WHICH A RAILWAY CORPORATION MAY OWE TO THE GENERAL PUBLIC TO FURNISH IT MEANS OF TRANSPORTATION, ABOVE AND SUPERIOR TO THAT CERTAIN, POSITIVE AND ABSOLUTE DUTY, EVERYWHERE

AND ALWAYS EXISTING, WHICH IT OWES TO ITS CREDITORS, TO MAKE PAYMENT OF ITS OBLIGATIONS; AND THE CONSTANT LIABILITY OF ITS TANGIBLE PROPERTY TO BE APPLIED TO MAKE SUCH SATISFACTION.

The property of individuals or corporations, who owe duties to the public, is not for that reason exempted from liability to attachment, except so long as it is in actual use in the discharge of that duty.

Drake on Attachment, 7th Ed., 252A.

Property has never been regarded as exempt from seizure to answer the debts of the owner because it was interstate commerce. Is a drove of cattle passing through the state exempt from attachment or execution in the jurisdiction in which it is found? Courts have affirmatively held that because property is in "transit" passing through the state, and thus interstate commerce, does not exempt it from seizure.

No more then should the instrumentalities of interstate commerce be exempt from seizure on that account alone. If there is anything that makes them sacred, it is that their seizure would be contrary to public policy, as injurious to the rights of the public, but this incohote indefinite right of the public (which no one sets up in the interest of the public) can never be more sacred than the absolute right of the individual to receive payment from his debtor out of that debtor's property.

WERE THE CARS OF THIS DEFENDANT IN THE CONDITION IN WHICH THEY WERE FOUND IMMUNE FROM SEIZURE BY ATTACHMENT?

In this connection we desire to advert, briefly as possible, to some of the expressions of courts to which we have referred in our authorities. We regard as decisive of the question at issue and as sound law and reasoning, the case of Boston, Concord & Montreal Railroad Co. vs. Gilmore et al., 37 N. H., 410, and we commend this case to your honors' careful consideration, because if the principles announced in that case are not good law our case fails upon this point.

We quote its essential propositions: It was a case where

a sheriff levied upon practically *all* of the rolling stock of the company under a writ of attachment, and practically the same objection was made as is made in the case at bar. At page 418 it is said: "We have carefully examined the authorities cited for the plaintiff, and are of the opinion that they do not support the ingenious propositions of counsel for the plaintiff, which we understand to be that the property owned by railroad corporations, and which is necessary for the discharge of their public duties, is vested in them in trust for the public; that the franchise of the corporation is the principal thing to which the tracks, depots, *engines, cars* and the like are mere incidents, and that all these constitute one entire thing, so connected that the cars and engines, etc., cannot be severed from their connection by an attachment or seizure on execution, and held as security or sold and applied as personal property ordinarily may be to the payment of corporate debts."

Again at page 420 the same court says: "We are unable to see any principle of public policy or convenience which should allow such corporations to mortgage their cars and engines which would not be equally strong to allow a creditor of the corporation to secure a lien substantially of the same kind by attachment. In either case the debt must be paid or the creditor by suitable proceedings may cause the property to be applied, by sale or otherwise, to the payment of the debt, and the inconvenience of the public, or to the corporation, is not materially greater in the one case than in the other. It would seem, then, that so long as the law allows to the corporation the right to deprive themselves by a mortgage, in a greater or less degree, of the power of readily performing their public obligations and allows them to contract debts which in the case of others may be secured by attachment, there can be little reason in denying to the creditor of a railroad company the ordinary right to secure his debt by attachment, especially when the debtors can readily relieve themselves from the inconvenience by payment or security."

We commend the closing clause of this quotation to the consideration of this court. The defendant in error here, one of the

largest railway corporations in the country, could have relieved its property from the burden of this attachment on an hour's notice by giving a delivery bond if it had so desired and wished to contest the claim for damages. It is a mere subterfuge for it to claim that these cars were necessary for it to operate its road, a road which probably has at least sixty thousand cars at its command, and loses more cars in any one of its numerous wrecks every month than were attached in this case, and with ample means to secure the release of its property.

Again at page 423 of its opinion the New Hampshire court says:

"THE PROPERTY OF INDIVIDUALS WHO OWE DUTIES TO THE PUBLIC IS NOT FOR THAT REASON EXEMPTED FROM LIABILITY TO THE ORDINARY PROCESS OF LAW, EXCEPT SO LONG AS IT IS IN ACTUAL USE IN THE DISCHARGE OF THAT DUTY. SUCH IS THE CASE OF THE CONTRACTOR TO CARRY THE MAIL. IT NEVER HAS BEEN HELD THAT THE STEAMBOAT OR COACH AND HORSES USED IN THE CONVEYANCE OF THE MAIL WERE EXEMPT WHEN NOT IN USE."

We again quote from the case of Coe. vs. Col. Piq. & Ind. R. R. Co., 10 Ohio, page 372, which was also a case involving the validity of an attachment, quoting from pages 378, 379 and 380: "There would be the same right of voluntary alienation and a like liability to involuntary alienation. *What the company could convey its creditors might subject.* In the absence of some express legal exemption "it is an inseparable incident to property, legal or equitable, that it should be liable to the debts of its owner as it is to his alienation.' * * * * * * But when the road is thus constructed and ready for use other things are required for that use—locomotives, cars and other articles and materials—some of which are consumed in use, and the supply has to be from time to time renewed. Now ,we think there is a manifest distinction between the road as constructed for use, and the various things employed in that use, and the latter cannot with propriety be regarded as part of the real estate, but are the personal property of the corporation. * * * * * * *

"It may be true that a railroad corporation holds its property in a certain sense as a public trust, to answer the purposes of a public highway, the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involves obligations to individuals, and to meet these obligations the property of the corporation must in some form be liable. The question is, in what form? Shall it be the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced *which may have the effect to delay creditors and operate as a shield to protect property from their just demands?*"

Again at page 382 the same court says:

"We are satisfied that it is not the policy of the state, nor just to individuals, that the power of a court should be invoked to enable an insolvent corporation to operate a railroad by protecting its property from the claims of its creditors—of those who have performed for it labor or have suffered losses or sustained injuries by the misconduct of its agents."

Again at page 383 of the same opinion the court says:

"So far as the railroad company itself is concerned it is entitled to no special immunity in this respect as to its creditors, and as to any inconvenience to the public by the temporary or permanent cessation of its business consequent in proceedings in insolvency against them, the necessity of which cessation is not apparent to us, such inconvenience would be the same in kind and would differ only in degree from that which would attend similar proceedings against any other private corporations."

The above is an Ohio case, which state is one of the "homes" of this corporation defendant in error.

The law as laid down in the above cases has been quoted with approval in Louisville & New Albany Ry. Co. vs. Boney, 117 Ind., 501, where that court says: "While it is true that 'the franchise to be a corporation is not a subject of sale or transfer unless the law by some positive provision has made it so and pointed out the modes in which such sale and transfer may be effected,' and while the authorities abundantly justify the state-

ment that property acquired and held by a corporation for the exclusive purpose of enabling it to accomplish the purposes of its creation cannot, without like authority, be either directly or indirectly alienated, it does not follow that creditors of such a corporation are remediless (1 Freeman on Ex., Section 179), railroad corporations may sell or mortgage personal property, and the better view of the subject seems to be that *the corporation's right voluntarily to alienate property and the creditor's power to subject it to the payment of corporate debts stand upon the same footing.*"

"Cars belonging to a railroad company incorporated and operating in a foreign state are liable to seizure under attachment if found within the commonwealth."

Buffalo Coal Co. *vs.* R. & S. L. Ry. Co., 8th Weekly. Notes cases 126 (Penn.).

"A stage coach with the horses harnessed and about to start, and the passengers about to take their places, or arrived at its stopping place and driven into an adjoining yard, though the passengers are not ~~disturbed~~ distributed, is liable to be attached."

Potter *vs.* Hall, 20 Mass., 368.

Congress has passed laws inflicting severe penalties upon anyone who interferes with the transportation of the United States mail. Yet it has been held that a "boat owned by a mail contractor may be attached if the mail be not on the boat at the time of seizing. It is not enough that in consequence of the seizure the contractor is put to inconvenience in complying with his contract and that there ensued a delay in the mail. The seizure itself must be a willful obstruction."

Parker *vs.* Porter, 6 La., 169.

"Engines, cars and rolling stock of a company must be regarded as chattels which have not lost their distinctive character as personalty, by being attached to and made a part of the railroad; and in practice the engines and cars of railroad companies have frequently been seized under execution and distrained for tax as personal property without any scruple as to the liability to such seizure."

Williamson *vs.* N. J. S. R. Co., 29 N. J. Eq., 311.
Randall *vs.* Elwell, 52 N. Y., 521.

"A train of empty cars which have been used in the past and were intended to be used in the future exclusively in carrying articles of interstate commerce are nevertheless not to be considered as engaged in interstate commerce until loaded with articles committed to the carrier to be transported to another state."

Norfolk & Western R. R. Co. *vs.* Commonwealth, 93 Va., 749.

WE REGARD THE QUESTION UNDER DISCUSSION AS AUTHORITATIVELY DECIDED AND SET AT REST BY TWO DECISIONS OF THIS COURT, AS WELL AS BY NUMEROUS DECISIONS BY THE UNITED STATES CIRCUIT AND DISTRICT COURTS.

It will not be contended but that vessels and steamboats plying the navigable waters of the country are just as much instruments of interstate commerce and just as much engaged therein, and owe just as important duties to the public, as railway cars or engines, and that they are just as much subject to the exclusive control of Congress. Yet this court has upheld as not a violation of the commerce clause of the Constitution, laws of the various states providing liens by attachment to secure damages, arising either *ex contractu* or *ex delicto*, against vessels and the owners thereof in actions *in personam* in the state courts, or in actions either *in personam* or *in rem* in the United States Admiralty courts, to enforce liens not provided for by the admiralty law.

In the case of Johnson vs. Chicago & Pacific Elevator Co., 119 U. S., 388, this court considered a statute of Illinois giving a lien by attachment upon a tug in a suit *in personam* against the owners of water craft for damages for negligence, the tort being other than maritime, and this court says:

"There being no lien upon the tug by the maritime law for the injury inflicted on land in this case, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under state statutes enforceable by at-

tachment in suits *in personam* are of every day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem* or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceedings to enforce the lien in a suit *in personam* by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered than there is in subjecting her to seizure on the execution. Both are incidents of a common law remedy which a court of common law is competent to give.

This disposes of the objection, that the vessel being engaged in commerce among the states and enrolled and licensed therefor, no lien could be enforced in the state court. The proceeding to enforce the lien in this case was not such a regulation of commerce among the states as to be invalid because an interference with the exclusive authority of Congress to regulate such commerce, any more than regulations by a state of the rates of wharfage for vessels and of remedies to recover wharfage, not amounting to duty on tonnage, are such an interference because the vessels are engaged in interstate commerce."

In the course of the opinion in the above case the learned author thereof quotes with apparent approval from Taylor vs. Carryl, 20 Howard, 583, as follows:

"The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined by statute as well as by judicial precedents. * * * * * * The habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution, and the titles to them or contracts or torts relating to them are cognizable in these courts."

This court has again lately given expression to its views upon this subject in the case of Iroquois Transportation Co. vs. De Laney, 205 U. S., 354 (The Winnebago), where it passed upon a state statute of Michigan giving a lien upon vessels, in the nature of a mechanics' lien for the balance due on the construction

price; and it was urged that the attempt to enforce the lien was while she was engaged in interstate commerce. This court again says:

"IT IS URGED THAT THE ATTEMPT TO ENFORCE THE LIEN ON THE VESSEL WAS WHILE SHE WAS ENGAGED IN INTERSTATE COMMERCE, AND THEREFORE PROCEEDINGS AGAINST HER WERE UNLAWFUL AND VOID IN VIEW OF THE EXCLUSIVE CONTROL OF THIS SUBJECT BY CONGRESS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES. BUT IT MUST BE REMEMBERED THAT CONCERNING CONTRACTS NOT MARITIME IN THEIR NATURE THE STATE HAS AUTHORITY TO MAKE LAWS AND ENFORCE LIENS, AND IT IS NO VALID OBJECTION THAT THE ENFORCEMENT OF SUCH LAWS MAY PREVENT OR OBSTRUCT THE PROSECUTION OF A VOYAGE OF AN INTERSTATE CHARACTER. THE LAWS OF THE STATES ENFORCING ATTACHMENT AND EXECUTION IN CASES COGNIZABLE IN STATE COURTS HAVE BEEN UPHELD, JOHNSON VS. CHICAGO & P. ELEVATOR CO., 119 U. S., 388. THE STATE MAY PASS LAWS ENFORCING THE RIGHTS OF ITS CITIZENS WHICH AFFECT INTERSTATE COMMERCE, BUT FALL SHORT OF REGULATING SUCH COMMERCE IN THE SENSE IN WHICH THE CONSTITUTION GIVES EXCLUSIVE JURISDICTION TO CONGRESS."

In *Ex. Parte* McNeil, 13 Wall, 236-243, this court affirmed a decree of the United States District Court for the Eastern District of New York, which obtained jurisdiction by attaching a foreign ship for half pilot fees claimed by the libelant under the New York statute.

In the course of a very instructive opinion by Hanford, district judge in the Robert Dollar, 115 Federal, 218, the court says at page 221:

"Therefore it is error to treat statutory liens enforceable in admiralty as burdens upon commerce, or to class them with laws intended to interfere with freedom of commercial intercourse. * * * * * Another important consideration is that if the interstate and foreign commerce clause of the Constitution is potent to shield foreign vessels from liens provided for by state laws to secure debts incidental to maritime contracts the same

rule of construction, if carried to its logical sequence, would annul all state laws providing legal process for the collection of debts contracted by nonresidents in commercial dealings with inhabitants of the state; for if a lien upon a ship is a burden upon commerce the levying of an execution for the satisfaction of a judgment upon the cargo of a ship or any consignment of merchandise brought into the state from another state or foreign country, to be sold in the course of trade, is also a burden upon commerce and has a tendency equally strong to discourage commercial ventures. Whether merchandise can be attached and sold for a debt of the owner pursuant to the laws of the state in which it is situated when the owner is a citizen and resident of a different state is not at this time a debatable question. * * * * * I consider that the interstate commerce clause of the Constitution can not now be extended to exempt the property of nonresident owners from the claims of creditors under state lien laws, or writs of attachment or other judicial process, without destroying principles which have become fixed under the sanction of a line of decisions of the Supreme Court."

There are some expressions in the above opinion which seem to indicate that the tort or contract sued upon, for which the lien is provided by the state law, must be one maritime in its nature, though not one provided for by the admiralty law. That may be true in suits *in rem* in the admiralty courts, though in many cases cited by the court in the Robert Dollar *supra* the federal courts have held that a lien given by a state law for negligence, or a wrongful causing death of a person, may be enforced by a suit *in rem* in the United States District Court. So we conclude that when the court uses the expression that "The lien must be one maritime in its nature," that it means that it must operate upon and affect a maritime subject. See the opinion of Justice Gray in The Glide, 167 U. S., 606. But this court in the cases of Johnson vs. Chicago & P. Elevator Co. and Iroquois Transportation Co. vs. De Laney, *supra,* do not recognize any such distinction in actions *in personam,* in form, to enforce a lien created by

a state statute to secure a liability in tort or contract not maritime in its character.

We thus see that this court, the final arbiter of all constitutional questions, without any splitting of hairs or indulgence in any speculation as to the condition of the ship when seized, or the rights of consignees, has unequivocally held that the attachment or other judicial seizure of vessels, be they great or small, under the laws of a state is not a "regulation of commerce between the states," though thereby a voyage of an interstate character may be *prevented* or obstructed or delayed. The same reasoning certainly applies with equal, if not greater force to the attachment of a few idle and empty freight cars.

.. "Vessels and steamboats employed in navigation in and out of the waters of a state are, like other property, subject to the laws of attachment for debts not due."

Menich *vs.* Tehauntepec Co., 16 La. Ann., 46.

"A creditor of a nonresident, who is part owner of a vessel, may proceed against the vessel by attachment when she enters the port."

Sibley *vs.* Ferris, 22 La. Ann., 163.

The learned Circuit Court in the course of its opinion (page 38 of the Record), adverting to the condition of the cars when attached, says: "It is further urged that some of the cars when attached were empty and had not started upon their return trip, and were not, therefore, engaged in interstate commerce," in Johnson vs. Southern Pacific Railway Co., 196 U. S., pages 1-21, a like contention was made as to a dining car which was regularly used to furnish meals to passengers between San Francisco and Ogden. The car was waiting at a point near Ogden for a train to carry it back to San Francisco. It was contended that until the car had actually started upon its return trip that it was not used in interstate traffic within the meaning of the safety appliance law of Congress. The Supreme Court said of this contention, "Counsel urge that the character of the car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being

put into a train for that purpose. Confessedly this car was under control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

There are many considerations in the case at bar which differentiate it from this dining car case.

First—In the case at bar the record affirmatively shows that the attached cars when seized were no component part of a train, but had arrived at their destination, had all but one been unloaded by the consignees and were standing empty and idle upon the tracks of the garnishees, and that there was no present existing intention to again use them in interstate traffic. (Record, pages 24-28).

These matters are nowhere disputed by the defendant, its only claim being one made, not in its own behalf, but in behalf of the garnishees, that the garnishees had the right to reload them without averring any intention to exercise that right.

In the dining car case the car was an essential and component part of a regular interstate train. It had a fixed and certain route of travel upon which it was regularly and daily in use. To meet an emergency it had been for a few hours temporarily detached from the rest of the train that it might the quicker resume its service as a component part of the return train. There existed a present intention to immediately put the car in regular use, and at the time to which the court's opinion is directed was actually being coupled onto for the purpose of turning it around preparatory to starting on its westbound trip that evening.

Second—In the dining car case this court was called upon to determine the applicability of an act of Congress, which in terms applied "to all cars used in moving interstate commerce," and the evidence showed that the car had been "stopped temporarily in making its trip between two points in different states." A car in that situation might well be said to be "used" in interstate traffic. It was presumably stocked, equipped and manned for its trip.

In the case at bar the court is called upon to declare the attachment laws of Iowa unconstitutional in so far as they allow the seizure of freight cars of foreign corporations, which the record shows at the time of their seizure had arrived at their destination and had been unloaded, and no present intention existed of again using them in interstate traffic.

Conceding that such a car might be said to be used in "moving interstate traffic" in such a sense that the acts of Congress in reference to automatic couplers would apply, yet the question now is, Is its seizure in such a situation under attachment an attempt to 'regulate commerce beween the states' and are the laws of Iowa authorizing the attachment of property of nonresident corporations to that extent unconstitutional?

But although, as the learned Circuit Court says, the contention was made in the dining car case that the car in question was empty, the Supreme Court did *not* so consider it, wherein the case at bar is widely different from that case, for here it was not disputed that they were empty (except one). This court at page 21 says: "Another ground upon which the decision of the Circuit Court of Appeals was rested remains to be noticed. The court held, by a majority, that as the dining car was empty and not actually entered upon its trip it was not used in moving 'interstate traffic,' and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that the car could not reach Ogden in time to return on its next westbound train, and it was therefore dropped off at Promontory to be picked up by the train as it came along that evening. The presumption is that the car was stocked for the return, and as it was not a new car nor a car just from the repair shops it was not an 'empty,' as that term is sometimes used."

It seems to us that the natural inference to be drawn from the language of the foregoing case is that cars found in the situation the record shows the ones in question were found are proper subjects of seizure under state laws, and were not engaged in

interstate commerce, especially to an extent that their seizure would be a direct and immediate attempt to regulate interstate commerce.

Chattels which are subjects of interstate commerce belonging to a nonresident are subject to attachment or levy upon execution though they may be in transit through the state.

"It is insisted that goods *in transit* passing through the state cannot be attached, but we know of no law nor of any good reason why they should not be."

Morrell *vs.* Buckley, 20 N. J. L., 667.

"Property in the possession of a carrier in transit and in the territorial jurisdiction of the court issuing the writ is liable to attachment the same as other property."

Am. and Eng. Ency. of Law, Vol. 5, page 239.

"Goods in the custody of the railroad company within the state and county where the writ is issued would seem clearly to be subject to attachment."

Santa Fe Ry. Co. vs. Bossut, 19 Am. and Eng. Ry. Cases, 683.

They may also be held by garnishment if the writ is served while the goods are within the territorial limits of the court and not too late for the company to stop the shipping.

Waples on Attachment, 2d Ed., Section 449.

Landa *vs.* Holck, 129 Mo., 164.

If goods which are clearly the subjects of interstate commerce can be attached under the sequestration laws of the state in which they happen to be, there is certainly no reason why an empty railroad car can not be seized in any jurisdiction in which it may happen to be, by virtue of judicial process issued in that jurisdiction, and the only qualification would be, that which exists in all cases, that if some third person or the garnishee has a lien upon or interest in the use or possession of such property superior to the rights of the actual owner, such persons can assert these rights in a proper proceeding and the levy would be subject to his lien, but the defendant can not by any special appearance, or by any motion or answer set up these rights for a third party.

3-4-5. *The record as made by the defendant in error in its special appearance, motion and affidavit and by the plaintiff in error in his resistance thereto, fails to establish any contractual relations between the defendant in error and the garnishees, or any arrangements which would in any way affect the plaintiff's right to attach the cars in question.*

In determining this question the court could not consider the answers of the garnishees, for there had been filed in the state court previous to removal pleadings controverting these answers in exact compliance with section 3945 of the Iowa Code heretofore quoted, and any question raised by the answers of these garnishees was thus put in issue and triable in the "usual manner," and we had the same right to such trial after removal to the Federal Court. The answers of the garnishees had nothing to do with the hearing of defendant in error's motion to quash under its alleged special appearance. Yet the court below seems to have given much weight to the matters contained in these answers and treated some of the allegations as established, though there were pleadings on file controverting every allegation contained therein, and these pleadings, as we have before shown, were not required to be sworn to under the Iowa Code.

A court might just as well take the allegations of a complaint as established where there was an answer duly on file denying them. The court could not consider issues of fact, regularly joined, between the plaintiff and the garnishees, in a motion filed by the defendant in error claiming to appear specially.

Whatever the "arrangement or understanding" was between the defendant in error and the garnishees we think it clearly appears that it did not arise to the dignity of a contract legally enforceable, but was simply an understanding that the garnishee companies would, ordinarily, forward freight received from the defendant in error in the same cars in which it was received to its destination, and when the cars were unloaded the garnishees could, if they so desired, reload said cars to some point on the homeward route; but it nowhere appears that the garnishees were *obliged* to receive the freight and forward it in the same cars, or

that the garnishees were *obliged* and bounden to return them loaded. If they needed the car they would probably reload it, but at that they might reload it for some point within the state. If they had idle cars of their own they would send the foreign car back empty.

But the chief objection in reference to this alleged contract is that no one asserts any rights under it, nor urge that any one except the defendant was deprived of the use of the attached property by the attachment. The garnishees do not claim that there was any intention on their part to use the cars, and if they did their rights could not be determined in defendant's motion to quash under its special appearance. No one claims that any shipper or the public in general was delayed or injured by the attachment. The most that can be said is that the defendant consigned its cars loaded with freight to a foreign state, and when they had arrived at their destination and had been unloaded and were awaiting return they were attached by virtue of the laws of such foreign state.

The best evidence, however, that no real contractual relations exist, such as is claimed, is that it is a matter of public history that during the railroad "car shortage" of 1907 nearly every railroad company in the United States, including this defendant in error and all these garnishees, issued peremptory orders that none of their own cars should go beyond their own terminals, and that they would receive no foreign loaded cars except at their own convenience. It must be a very binding contract that can be thus abrogated.

The learned Circuit Court lays much stress upon section 5258 Rev. Statutes U. S., which is as follows:

"Be it enacted that every railroad company in the United States whose road is operated by steam is hereby authorized to carry upon and over its road, boats, bridges and ferries all passengers, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination."

This statute does not make it obligatory upon railroad corporations to form continuous lines for transportation, nor does it say anything about the transportation being in the same cars; but it has no application here, for the record clearly disclose that these cars had performed their interstate mission. The continuous carriage had been completed, the cars had been unloaded. The return home might be very devious and uncertain. They might be returned from the destination point to the initial point loaded, or they might be so returned empty. They might be sent to an intermediate point loaded and from thence returned empty, or they might be sent to an intermediate point empty and from thence returned loaded, or they might be diverted at any point by order of the owner, or through the needs of the companies in whose possession they were to points remote from the direct route home. Surely this statute can have no bearing upon the return of empty cars.

Suppose there was an arrangement for through and continuous carriage in the same cars. That arrangement had been consummated. As to the return of the cars, if the garnishees had such a lien upon or interest in them, that they had a right to reload them and *desired to exercise that right* it was for them to set that right up and insist upon it by appropriate proceedings, but the defendant in error can not appear specially to set up rights of third parties which they themselves are not insisting upon, nor has it the right to urge such right by motion or otherwise.

The motion of the defendant in error can only be sanctioned by virtue of section 3929 of the Code of Iowa. While it is denominated a motion it is in all its essentials a "pleading" under section 3948, and the plaintiff in error was entitled to a hearing thereon in the "usual manner," with the issues joined between the plaintiff and the garnishees.

The Supreme Court of Iowa, in construing this section 3929, upon which it is claimed the defendant's motion was based, has held:

"The motion to discharge the attachment was evidently

based upon section 3018 of the Code (now section 3929), which is as follows:

(A motion may be made to discharge the attachment, or any part thereof, at any time before trial for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied upon all or some part of the property held,) * * * The motion is based upon the last of these causes and raises the question whether it shows a cause making it apparent of record that the writ of attachment should not have been levied upon the growing wheat on defendant's farm. It was said in McLaren vs. Hall, 26 Iowa, 300, that 'in order to justify the discharge of property on a motion of this kind, so summary in its character, the case should be made clear and satisfactory; otherwise the party should be left to the ordinary means, by the proper action, for testing the liability of the property levied upon to be seized by the writ.' In the language of the statute it must be made *apparent of record* that the property should not have been levied upon in order to authorize its discharge from attachment. It does not, however, contemplate cases where a third person claims the attached property, or an interest therein, or lien thereon. Such cases are provided for in section 3016 of the Code (now section 3928), which authorizes such claimant to present his petition, verified by oath, setting forth the facts upon which his claim is founded, and upon which petition his claim may be investigated. In the case before us the defendant sets up the claim of a third party to the property as grounds of his motion to discharge the same from the levy. The statute does not authorize the defendant thus summarily to cut off plaintiff's right to contest the title of the claimant, especially when the latter has not asked to be made a party and has made no claim to the property in any legal manner."

Tidrick *vs.* Sulgrove, 38 Iowa, 339.

This case, as well as McLaren *vs.* Hall, 26 Iowa, 300, cited therein, are expressions from the highest court of Iowa construing this statute, and it needs no citation of authorities by us to show that such construction is binding upon this court.

The motion of the defendant should have been overruled for other reasons: There was a resistance thereto controverting all its essential allegations and controverting the affidavit in its support. When a resistance is thus filed raising issues of fact it is not permissible to determine a motion to quash in the summary method provided for in section ~~2948~~ 3487, and the Supreme Court of Iowa has thus held and the proposition is supported by good reasoning.

"If the statements of fact contained in the motion be denied the defendant would have to proceed in a more formal manner to try the right to hold the property on the writ."

Rausch vs. Moore, 48 Iowa, 611.

The court should not have considered this motion for another reason. It was verified by one Higgins, who styles himself "Auditor of Disbursements of Defendant Company." Whatever his duties are, or whatever his knowledge or means of knowledge is as to the matters sworn to in behalf of the defendant, does not in the motion or affidavit appear; nor does the motion or affidavit state any facts from which such knowledge may be inferred. As said before, the motion sets up facts outside the record, and necessarily requires verification the same as a pleading, which in all its essentials it is.

The Code of Iowa, section 3584, provides:

"If the statements of a pleading are known to any person other than the party such person may make the affidavit, which shall contain averrments showing affiant competent to make the same."

We have, then, this situation: These cars had been regularly attached. A showing was necessary in order to have them released upon motion, and it must be made to "appear of record, clearly and satisfactorily," that the property should not have been levied upon before it can be released on motion; and in addition the Supreme Court of Iowa has held that if such showing be denied or controverted the property should not be released upon such a summary proceeding. The verification to the facts stated in the motion is not sufficient under the Iowa statute, nor is it

sufficient under general principles governing affidavits, in failing to show personal knowledge, means of knowledge or facts from which such knowledge may be inferred.

In Foushee *vs.* Owen, 122 N. C., 360, it was held not only that the interests of third persons in the attached property could only be raised by such third person as an intervenor, but that the attempt so to do by the defendant converted a special appearance into a general appearance.

In the case at bar the entire substance of the motion in effect goes to the alleged rights of the garnishees. It is claimed that certain contracts exist giving the garnishees certain rights in the attached cars, and the court says in its opinion that these rights might be enforced by a "mandatory injunction." That might be true, but at whose instance? Could the defendant obtain a mandatory injunction against itself? All the allegations contained in the defendant's motion relating to the rights of the garnishees to reload the cars, etc., are entirely irrelevant and out of place in such a motion. All of the allegations of said motion in the second division thereof are entirely irrelevant, for that relates to the process of garnishment and is expressly covered by section 3948, heretofore quoted, which requires the defendant to file a "suitable pleading."

Stripping the motion of all its allegations relative to the alleged rights of third parties in the attached property and the rights and defenses of the garnishees in the garnishment proceedings, there is nothing left upon which the defendant itself can claim any immunity.

Under the authority of McLaren *vs.* Hall, 26 Iowa, 300, *supra,* it was clearly the duty of the court to overrule the defendant's motion, for who can say from reading the record that it has been "clearly and satisfactorily made apparent of record" that these cars were exempt from attachment: We understand that the Iowa courts have held that it may be made thus "apparent of record" by affidavits, but the cases cited by the learned court below to that effect were cases where the affidavits were uncontroverted. What shall we say of a case where the defendant's

affidavit and motion are resisted and controverted by counter affidavits? How is it made "clearly and satisfactorily" to appear when we have one affidavit controverted by another and some of the counter allegations in no wise disputed? And the affidavit of the defendant in error is made by one who avers no knowledge or means of knowledge of the facts sworn to and shows no facts from which such knowledge may be inferred.

6. "This section 5218 imposes no duty, but merely permits or authorizes the carriage of traffic from one state to another."

Ken. Bridge Co. *vs.* Louisville, 37 Fed. Rep., 567.
Am. & Eng. Encly. of Law, Vol. 6,609.
Ibid, Vol. 17, 151.

The attachment of cars after they have arrived at their destination and have been unloaded is surely no burden upon the through carriage of the freight which they formerly contained, and the most that can be said is that it might prevent the receiving carrier from using them, but no one claims or makes any pretense, nor is there any such claim made in argument or urged in the opinion of the court, that any of the receiving companies desired or intended to use them. Nor is any claim made, either in the motion to quash, the affidavit in support thereof, nor in argument, nor in the opinion of the court that these cars were loaded when seized.

It cannot be contended with any great seriousness that the Iowa statute authorizing the seizure of the property of a non-resident or of a foreign corporation upon a writ of attachment, or upon execution, is unconstitutional in so far as it authorizes the seizure of property which is interstate commerce. The cases all hold that that fact does not exempt it from liability for the debts of its owners. If A, a resident of Chicago, obtains from B, a resident of Sioux City, a carload of horses by means of false representations and proceeds to ship them to Chicago, is there any doubt in any mind that B could pursue the horses and seize them by writ of attachment or replevin at any intermediate point, even though they had become interstate commerce and their seizure

might incidentally delay the train on which they were being transported?

The learned court below cited a number of cases wherein this court has held that certain state laws were invalid, as levying taxes and imposing onerous duties, and making discriminating impositions upon interstate traffic, but there is a wide difference between the right of a state to directly impose these burdens and impositions upon interstate commerce, or the instrumentalities thereof, and the right of a state to protect the property and welfare of its own citizens by providing for the sequestration of a debtors' property found within the state for the payment of its owner's debts.

Can it be said that the enforcement of the payment of a debt against the owner of subjects of interstate commerce by authorizing its seizure to secure that debt is a "trammel" or a burden upon commerce in any constitutional sense? One of the most notable cases of the class cited by the court below, which we think will illustrate the point we make, is the case of Kelly *vs.* Rhodes, 188 U. S., page 1. That was a case where the legislature of the state of Wyoming had passed a statute taxing live stock brought into the state "for the purpose of being grazed." Kelly owned some sheep, which he was driving from Utah through Wyoming to Nebraska, and the assessor of Lamarie county, Wyoming, seized them under the statute for taxes. This court held that they were subjects of interstate commerce and not subject to the burden of taxation under the laws of Wyoming. But suppose that while they were being driven across the state they had encountered a toll bridge maintained and operated by the state, would not they have been subject to toll?

Or let us consider how different would have been the result, if instead of the assessor levying upon the sheep for these taxes, the sheriff of Laramie county had seized them under a valid execution, or writ of attachment issued from Laramie county and directed against the owner, Kelly, would this court have then held that because they were subjects of interstate commerce they were exempt from judicial levy to answer the owner's debts?

It then clearly appears from these considerations and the authorities heretofore cited that interstate commerce itself is not exempt from seizure, to answer the debts of its owner: If the subject itself is not exempt, why should the mere instrumentality used to convey it be exempt? It is not. The only consideration which could govern the court would be that under some circumstances and conditions the seizure of instrumentalities of commerce would be unwise and not allowable on the grounds of public policy. This is not a question of interstate commerce. There has been no regulation of interstate commerce. It is a question of public policy.

The attachment of loaded cars might not be permitted because to do so would invade the right of the shipper and owner of the contents, who has a prior and superior right in the cars *by reason of his contract of hire* and necessity for their use. But that question is eliminated in this case by reason of the cars not being in use, and is fully considered in the cases cited at the beginning of this argument, and in no event could it be considered in a motion by the defendant to quash the attachment. The defendant in error could have sold these cars in the condition in which they were attached. It had the absolute power of alienation over them. If it had sold them loaded, in transit, the sale must have been subject to the shipper's right to have them transported to their destination and there unloaded of their contents.

The rights of the creditor to compel involuntary alienation are co-extensive; whatever the debtor can sell the creditor may seize.

The defendant in error in its motion to quash states that these cars are necessary for it to properly perform its public duties. Is that a reason why they should be exempt from seizure for the payment of the debts of the owner? But the contention is denied by the resistance and the claim is puerile when we consider the vast resources of the defendant in error, its great number of cars, its power to give bond and its ability to lease other cars.

Among reasons, if not the strongest reason, for the vesting

in Congress the power to regulate interstate commerce was the desirability of insuring uniformity of regulation against conflicting and discriminating state legislation.

"The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation."

Railroad Co. *vs.* Richmond, 19 Wall, 584-599.

The states are not prohibited from legislating upon many subjects which affect interstate commerce, providing the legislation is not disciriminating in its nature. They have the power to enact laws for the safety, health, protection and general welfare of their own citizens.

"We take it to be a point settled beyond all question or contradiction that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments with their houses and effects, and property, belonging to, or in the use of the government of the United States."

Coe vs. Errol, 116 U. S., 517.

"The doctrines announced in the cases of Cooper *vs.* Reynolds, 10 Wall, 308; Maxwell *vs.* Stewart, 22 Wall 77 and other similar cases apply to actions commenced in the state courts and under local statutes. Every state has a right to confer jurisdiction upon its courts over all property within its territorial limits and to apply and enforce such remedies as may be deemed appropriate by the legislative will. If a suit is properly commenced in a state court and be rightfully removed to a federal court such court has jurisdiction to enforce all acquired liens and to administer such remedies as the state court could and would have done if it had retained jurisdiction of the action."

Lacket *vs.* Rumbaugh, 45 Federal, 23, at page 32.

A state may pass laws governing charges for wharfage and enforce them by proceedings against vessels engaged in interstate commerce.

Packet Co. *vs.* Catlettsburg, 105 U. S., 559.

And this court has said that proceedings to enforce a lien by

attachment under a state statute is no more a regulation of interstate commerce than to impose and collect wharfage charges.

It is the enforcement of a law, non-discriminating, enacted for the welfare and protection of its own citizens and is analagous to if not a part of that broad power remaining to the states generally called its "police power," which includes nearly everything relating to the safety and welfare of the people of a state. States have power to pass inspection laws applicable to goods shipped to other states.

McLean *vs.* D. & R. G. R. R. Co., 203 U. S., 38.

They have power to levy *ad valorem* taxes upon personal property of foreign corporations used within the state though engaged in interstate commerce.

Penn. *vs.* Pullman Palace Car Co., 141 U. S., 26.

They have power to provide charges for scaling logs and give a lien therefor and provide means for its enforcement.

Lindslay *vs.* Mullen, 176 U. S., 145.

On a great many other subjects each state may legislate, even though such legislation may affect interstate commerce.

"A state or territory has the right to legislate for the safety and welfare of its people, and this right has not been taken away from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress or is an attempt to regulate interstate commerce."

McLean *vs.* D. & R. G. R. R. Co., 203 U. S., 38.

7. IT IS A SETTLED RULE OF CONSTRUCTION OF THIS COURT THAT A STATE LAW OR THE ACTION OF STATE AUTHORITIES, IN ORDER TO BE CONSTRUED TO BE A REGULATION OF "COMMERCE BETWEEN THE STATES," MUST BE A DIRECT INTERFERENCE OR REGULATION, AND DIRECTLY AND SUBSTANTIALLY HURTFUL, AND NOT A MERE INCIDENTAL OR CASUAL INTERRUPTION, OR REMOTELY HURTFUL.

In Sherlock vs. Alling, 93 U. S., 99, this court says:

"Numerous decisions are cited by counsel to the effect that the states cannot by legislation place burdens upon commerce with

foreign nations or among the several states. The decisions go to that extent and their soundness is unquestioned. But upon an examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or for conditions for carrying it on. * * * * * And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of Congress, as in Brown vs. Md., 12 Wheat, 425, etc., the legislation created in the way of a tax, license or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. * * * * * The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are with some exceptions those prescribed by the state to which the vessels belong, and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

What is here said of persons within the territorial jurisdiction must be equally true of property. This case has been followed and cited with approval in a number of more recent cases cited in our brief, and is the settled law of the land.

"Interference with the commercial power of the general government to be unlawful must be direct."

L. & N. R. R. Co. *vs.* Ky., 183 U. S., 503.

If the seizure of the cars in question could be in any sense an interference with interstate commerce its consequences were so

indirect, remote and uncertain that no hurtful result could follow. What effect did it have upon commerce? None whatever so far as the record discloses. Who was using the cars at the time they were attached? No one. What did they contain: Nothing, (except one). Who says that they desired or intended to use them? No one. When, if ever, were they again to be put in use in moving interstate commerce? No one tells us. The inconvenience to the defendant in error caused by their attachment was no more than that to which every debtor is subjected by the seizure of his property. What is the inconvenience suffered by this defendant in error compared to that which would accrue to the humble farmer of Dakota County, Nebraska, who hauls a load of produce to the Sioux City, Iowa, market, and has his team seized to answer a debt he owes to an Iowa creditor, and yet that team is just as certainly engaged in interstate commerce as the most palatial passenger train that crosses the fields of Iowa bound for the Golden Gate.

The position of the defendant in error is based mainly upon the cases of Conery *vs.* Q. O. & K. Ry. Co., 92 Minn., 20, and Wall *vs.* N. & W. Ry. Co., 52 W. Va., 485.

There are many points of difference between these two cases and the case at bar in the facts, and there are many erroneous assumptions of law contained in the opinion in each case.

In the Minnesota case the court says that from "the facts established on the hearing of the motion it appears" that an agreement existed that the receiving company should return the car *reloaded,* and that at the time of the levy the car was actually "awaiting reloading by the Minnesota Transfer Co. in its yard with a return shipment to points in Missouri." There then existed according to the opinion a positive agreement, not that the receiving company should have the right to reload the car if it so desired, but that the receiving company should unload it and return it loaded. It also appears that the receiving company was about to reload the car with a shipment for Missouri. There then existed a present definite intention to at once put the car in use, loaded with a certain shipment for a definite locality outside

the state of Minnesota. In both of these important, we might say decisive, particulars the case of Conery *vs.* Q. O. & K. Ry. Co., differs from the case at bar. It does not seem, however, that in the above case the car was so situated that its seizure would be a regulation of commerce, we can not subscribe to a doctrine which would thus give an immunity to property of a non-resident not granted to a resident. The court overlooks the doctrine that all property is primarily liable for the obligations of its owner.

The foregoing case is largely based upon the Minnesota statute as interpreted in the case of Stevenot *vs.* Eastern Minn. Ry. Co., 61 Minn, 104, but that was a garnishment case and holds that a railway company is not liable to garnishment for goods of a debtor in its possession for transportation to a point outside the state, and even this contention is not borne out by authority unless the property sought to be reached by garnishment is without the jurisdiction of the court.

Adams *vs.* Scott, 104 Mass., 164.
Landa *vs.* Holck, 129 Mo., 663.
Rood on Garnishment, Sec. 37.
Waples on Attachment, Sec. 449.
Montrose Pickling Co. *vs.* Dodson, 76 Ia., 172.

The Conery case, 92 Minn., 20, seeks to enlarge the scope of the Stevenot case, 61 Minn., 104, and make its reasoning applicable to the actual attachment of property in the hands of a carrier, but the Stevenot case itself refutes any such contention, for therein the court says: "If plaintiff desired to arrest it in this state he should have resorted to attachment and taken actual possession of the property."

All property is subject to actual attachment by levy thereon, if found within the jurisdiction of the court issuing the process, and property in possession of a common carrier is not above the law in this respect even if it is interstate commerce, and no good reason can be urged why it should be, tangible personal property has its "legal *situs*" wherever it is found.

The Minnesota case was decided under statutes so differ-

ent from the Iowa statute as in no respect to be an authority in the case at bar.

So, too, a careful consideration of the case of Wall vs. N. & W. R. Co., shows how different is it in its facts and legal aspects from the case at bar. In that case a *loaded* car, which belonged to the Pennsylvania Railroad Company, was attached after it had reached its destination, and while it was being unloaded. The Pennsylvania Company did not appear, but the Norfolk & Western Ry. Co., the garnishee, and in whose possession the car was when attached, "filed an answer which stands as taken for true and uncontroverted as to its statement of facts." In this answer it asserted and set up that it had such arrangements and contracts with the Penn. R. Co. that after the car had been unloaded it, the garnishee, was to return it "reloaded" with freight to some point on or near the line of the defendant company. In this uncontroverted answer the garnishee asserted an interest in the car, not alone a right to use it, if it so desired, but an arrangement by which it *was* to use it, plainly declaring a present intention to reload the car and that it, the garnishee, would be hampered and trammeled in its business if such arrangement was interfered with by the attachment of the car. In other words, it asserted and maintained its superior rights in the car. No such question is before this court in the case at bar, and even if this court could consider the answers of the garnishees, no such question would arise for they nowhere claim that the cars attached in this case were to be returned by them loaded. The defendant in error could not, and does not in its motion *assert* the rights of the garnishees to reload the cars nor does it even claim that they were to be reloaded, or that any intention existed to reload them, and the whole motion is controverted, the existence of the alleged arrangement is denied and the true condition pointed out in the ninth paragraph of the resistance to defendant's motion, (Record 26) and contractual relations are absolutely denied.

In the Wall case the garnishee claimed, and it was not denied, that it had an arrangement with the principal defendant that it was to return the car *loaded*. That the car when at-

tached had not yet been unloaded. It was claimed by the garnishee, and not denied, that its seizure would "nullify the rights of the garnishee." The garnishee made itself an actor in the case, set up and maintained its superior rights in the property, and the issue was tried between the garnishee and the plaintiff. In all these important and decisive matters the Wall case differs from the case at bar. No such contentions are urged in this case, either by the garnishee or principal defendant, and upon issues which were joined between the garnishees and the plaintiff, we were denied a trial of by the court's summary dismissal of the garnishees, and of the case.

We cannot agree with the court in the Wall case wherein it says: "So I think the common law exempts rolling stock from execution." The contrary is held in the well considered cases which we have heretofore cited. No good reason can be advanced why a creditor cannot levy upon any thing his debtor can sell, unless it is exempt by statute. If rolling stock of a corporation is exempt, why should not be vessels also?

All the considerations urged by the court in the Wall case, as to the car not being attachable are based mainly upon the point, set up by the garnishee itself, that its interest in the car was such that it could not be deprived of its use. It was the rights and interests of the *garnishee* which were before the court in that case.

The court says: "It had the important right of loading that car." "In short, the garnishee had a subsistent contract for the possession and use of this car." "It had the right to keep the car until it returned it loaded to the Penn. Co."

All these considerations of the interest of the garnishees in the attached property are absent from the case at bar, and in no event could be considered except in determining the issues between the plaintiff in error and the garnishees.

It was urged in argument in the case of Wall *vs.* Ry. Co. that "the answer of the garnishee did not set up a contract but relies simply on a universal custom among railroad companies as to such traffic arrangement." But to this, under the *uncontro-*

verted allegations of the garnishee's answer, the court replies: "This contention can not be ssutained in the face of the fact that the answer affimatively avers that an arrangement and understanding existed between the defendant and garnishee company." Those words plainly import a perfect contract, because by the agreement and understanding of parties there is a union of minds upon a specific thing."

All these matters which went undenied in the Wall case were controverted in the case at bar, and in the case at bar no one claimed a desire to exercise the right to reload the cars if such right existed. Not only did the plaintiff in error deny the existence of any contractual relations between the defendant and the garnishees, and not only did it set up that the garnishees intended to return the cars empty, which allegation is nowhere denied, but the plaintiff in error in paragraph nine of his resistance pointed out the true relation existing between the defendant and the garnishees. That the much paraded right to use the cars of another company is a mere license or privilege, not depending upon contract, but restinpon custom and depending upon the convenience of the companies. (Record, page 26.)

And if evidence were to be taken we would find that every railroad official would so testify, except in cases of some roads closely affiliated.

Other considerations which influenced the opinion of the court in the Wall case are absent in the case at bar. The court says: "But is not the operation of this writ of attachment a direct impediment and obstruction of interstate commerce? If this levy is given any effect, it would take the car from the custody of the Norfolk & Western after it had started on its mission of carriage from one state to another, while yet its freight was under its roof and entitled to shelter from the elements and the security of its enclosure. Its transit with its freight *had not yet ended when the writ was levied.* The protection and security of the plaster were a part of the function of interstate carriage, and the railroad company and the consignee were entitled thereto just as much as they were entitled to the car for its transporta-

tion to the point of consignment. Not only so, because that attachment would prevent the Norfolk & Western Company from taking that car to some point on its line, loading it with goods and hauling it back over its road, etc."

Altogether the Wall case is so different in its facts and so different in the manner in which the issues were raised as to be no authority in the case at bar.

In so far as either the case of Conery *vs.* Q. O. & K. Ry. Co., supra, or the case of Wall *vs.* N. & W. Ry. Co. seek to put immunity from attachment upon the provisions of the Federal statutes referred to, they are based upon a misapprehension of the scope and extent of those provisions. These statutes impose no affirmative duty upon common carriers, and do not make it obligatory for them to enter into any contracts or traffic arrangements, as the opinion in both cases implies; they simply give to carriers the right to connect with other roads if they so contract, or arrange so as to form continuous lines, but as we have before shown section 5258 "imposes no duty but merely permits the carriage of traffic from one state to another."

Kentucky Bridge Co. *vs.* Louisville, 37 Fed., 567.

There is nothing in the United States statutes which require "shipments to go forward from the originating point to point of destination in the cars in which they were first loaded," as erroneously premised by the learned court in the case of Conery *vs.* Railway.

The court in both of the cases just cited stretches the scope of the Federal Constitution beyond all limits and beyond all precedents. The Federal Constitution is supreme to prevent the states from enacting legislation discriminating in its character, or imposing direct burdens upon interstate commerce.

The ordinary sequestration laws of a state are also supreme, within their own limits, authorizing the attachment of the property of non-residents, though such seizure may affect interstate commerce or the instrumentalities thereof. We regard the doctrine of the two cases above cited, in so far as they hold that the seizure of articles or instruments of interstate commerce, by vir-

tue of state laws, is a "regulation of interstate commerce" as absolutely refuted by, and opposed to the principles announced in Iroquois Transp. Co. *vs.* DeLaney, 205 U. S., 354, (The Winnebago) and Johnson *vs.* Chicago Elevator Co., 119 U. S., 388.

Both the case of Conery *vs.* Q. O. & K. Ry. Co., and Wall *vs.* N. & W. R. Co., were cited and relied upon by the plaintiff in error in its brief in Iroquois Transportation Co. *vs.* Delaney, *supra,* but apparently were not regarded by this court as good law, as the court in its opinion upon that branch of the case held directly opposite to the contention made by the plaintiff in error and affirmed the decision of the lower court upon that point.

Section 7 of the Interstate Commerce Act, Compiled Statutes 1901, page 3159, has no bearing upon this question. This section simply forbids combinations to prevent the carriage of freight from being continuous. A careful consideration of the above cases shows that the vital facts upon which the opinion was based in each case are lacking in the case at bar or that an opposite condition exists.

WERE THE FUNDS IN THE HANDS OF THE GARNISHEES SUBJECT TO GARNISHMENT?

Section 3897 of the Code of Iowa provides:

"Property of the defendant in the possession of another, or debts due the defendant may be attached by garnishment as hereinafter provided."
inafter provided."

In this case, besides attaching the cars of the principal defendant, which the return of the sheriff shows were actually seized and return made as being in his possession, (Record, page 17) all of said companies were served with notices of garnishment as is provided in section 3935 of the Code of Iowa, heretofore quoted at page 7.

All of these garnishees appeared generally in the District Court of Woodbury County, Iowa, before the defendant filed its petition for removal to the United States Circuit Court, submitted themselves to the jurisdiction of the court, and filed answers which are set out in the Record at page 14.

None of the garnishees intervened claiming any lien upon

or interest in the attached and garnished property as is provided by section 3928 of the Code of Iowa, heretofore quoted at page 7.

To the answers of the garnishees, and each of them, the plaintiff in error filed a pleading controverting the same, not under oath, but in exact conformity with sections 3945 and 3986 of the Iowa Code heretofore quoted at page 8.

The answers of these garnishees, thus controverted by the pleading of the plaintiff in error, raised issues of fact upon which the plaintiff was entitled to a trial in the usual manner the same as upon any other issue joined between plaintiff and defendant, and had a right to introduce evidence and submit the issues to a jury, under the statutes quoted.

The trial court dismissed these garnishees, on motion of the defendant in error, after the issues were thus joined, and the plaintiff in error has thus been denied a trial of these issues upon the merits.

In justification of its action in this regard, the trial court urged, as shown by its opinion at page 38 of the Record.

1st. That any debt owing from the garnishees to the principal defendant, their creditor, was not subject to garnishment in the courts of Iowa, because such debts had a *situs* without the state of Iowa, were due from a non-resident to a non-resident, payable without the state of Iowa, and thus beyond the jurisdiction of the courts of Iowa.

2d. That if any debts were owing from the garnishees to the principal defendant, said debts were for defendant's share of the compensation arising from the freight in question, and as much a part of interstate commerce as the actual carriage of property.

The court below was in palpable error in both of its conclusions. The rule announced in Mooney *vs.* Railway Co., 60 Ia., 397, and in German Bank *vs.* American Ins. Co., 83 Iowa, 491, as to the *situs* of garnished debts, is the true rule and is supported by authority which is convincing and overwhelming.

In the first place we must remember that we are not con-

sidering any objections of the garnishees to the jurisdiction, but only objections made by the defendant itself.

There was formerly much diversity of opinion as to the right to reach a debt owing from a non-resident to a non-resident by garnishment, and the decisions are said to be in irreconciable conflict, but we thing not. We regard the opinion of this court in Harris *vs.* Balk, 198 U. S., 215, and Mooney *vs.* Buford & George Mfg. Co., 72 Fed., 32, as decisive of this question.

This court in Harris *vs.* Balk, holds, "As under the laws of Maryland, the garnishee could have been sued by his creditors in the courts of that state he was subject to garnishee process if found and served in the state, even though there temporarily, no matter where the *situs* of the debt was originally."

There is no inhibition in the Iowa Code against non-residents bringing suits in that state, and there could not very well be under the Constitution of the United States, so the defendant in error could have maintained a suit in Iowa against any of the garnishees indebted to it.

The record shows that all of the garnishees were engaged in operating lines of railway in Iowa and were all served with garnishee process in Iowa under the statutes heretofore quoted, sections 3497 and 3529 of the Code of Iowa, and one of the garnishees, the Chicago, Rock Island and Pacific Ry. Co., Is AN IOWA CORPORATION. They were all subject to process in the courts of Iowa and have all appeared and answered in the garnishment proceedings.

But it will be contended that the debts, if any existed, owing the defendant from the garnishees, were payable in Chicago, and hence were not subject to garnishment by process served upon the garnishees in Iowa. But this is not the law.

In the first place the allegation as to place of payment has no place in a special appearance, and it is not alleged that there is any written agreement as to place of payment, but if there was, it would not prevent the creditors from suing elsewhere. The Code of Iowa, section 3496, provides that: "When by its terms, a written contract is to be performed in any particular

place, action for breach thereof may be brought, except as otherwise provided in the county where such place is situated."

But this statute is permissive and not mandatory.

Troy Mill Co. *vs.* Bonen, 7 Ia., 465.

Iowa Loan & Trust Co. *vs.* Day, 63 Ia., 459.

Leiber *vs.* U. P. R. Co., 49 Ia., 688.

"When the garnishee is indebted, it will not vary his liability that his contract with the defendant is to pay the money in another state or country than that in which the attachment is pending. Thus when it was urged as a ground for discharging a garnishee, that his debt to the defendant was contracted in England, and was payable there only, so that the defendant could not, and therefore the plaintiff could not, make it payable elsewhere, the court said: "We do not perceive any legal principle upon which the objection rests. This was a debt from the garnishee everywhere, in whatever country his person or property might be found. A suit might have been maintained by the defendant here and therefore the debt may be attached here." So where the debt was contracted where the garnishment took place, but the garnishee agreed to pay the money in another state, he was nevertheless charged, the court referring to the case just cited as sustaining their decision, and in Iowa a garnishee of a defendant residing in Nebraska was charged though his debt was contracted and was payable in the latter state, and was there exempt by law from attachment or execution."

Drake on Attachment, Sec. 597.

Citing:

Blake *vs.* Williams, 6 Pick., 286.

Mooney *vs.* U. P. R. Co., 60 Ia., 346.

Sturtevant *vs.* Robinson, 18 Pick., 175.

Com. Nat. Bk. *vs.* C., M. & St. P. R. Co., 45 Wis., 172.

E. T. Va. & Ga. R. R. Co. *vs.* Kennedy, 83 Ala., 462.

Leiber *vs.* U. P. R. Co., 49 Ia., 688.

But the trial court also held that "It is not necessary to determine this question," (that is the liability of the funds, if any, to garnishment) "in this case for the defendant's share of the com-

pensation for the carriage of the freight in question is as much a part of the interstate commerce within the meaning of the Acts of Congress regulating commerce, as is the actual carriage of the property." Record 39.

The court thus holding that the garnishment of funds belonging to a railway corporation, which funds were the receipts for the carriage of interstate freight, would be a "regulation of commerce between the states" within the meaning of the Constitution.

Can this be so? It is a remarkable proposition that funds due a principal defendant can not be garnished because they are receipts or proceeds due for the carriage of interstate commerce. That would be an extension of the commerce clause of the Constitution to a length never dreamed of by the framers of that document.

As we have before shown, interstate freight itself in transit is liable to actual attachment at the suit of the creditor against the owner. Why, then, should not the compensation received for the carriage of that freight be also subject to attachment or garnishment at the suit of a creditor against the owner of those funds? If the freight itself is not immune, why should the funds received for its carriage be immune?

All the funds of railway corporations are largely made up of receipts for carriage of interstate freight. Carried to its logical conclusion, then, the above doctrine would exempt the bank account of every railway corporation in the land from levy either by attachment or execution. The court below cited no authority for its remarkable conclusion, and we venture to say that none can be found. If funds in the hands of a garnishee are exempt because they are the proceeds of interstate commerce, these same funds are none the less exempt when transferred to the bank account of the principal defendant, and if exempt in the hands of a garnishee, they are also exempt in the hands of the creditor, (principal defendant) and if the defendant's tangible property is exempt because it is used, or may be used to carry interstate commerce, and the receipts for the carriage of interstate commerce are also exempt, the creditor is helpless to

collect his debt in any jurisdiction. Any such doctrine finds no authorization in legal annals, and results in placing railway corporations beyond and above the law, and granting them privileges and immunities denied to the humble citizen, and finds no sanction in any federal statute.

The commerce clause of the Constitution was never intended to save or protect corporations of an interstate character from litigation. They are no more immune than the ordinary citizen. It was never intended by the framers of that instrument to exempt them from suit, process or litigation, nor to prevent the sequestration of their property, local or interstate, in any jurisdiction where laws authorize such proceedings against it, resident or non-resident.

BRIEF OF THE ARGUMENT.

DIVISION II.

THE DEFENDANT IN ERROR MADE A GENERAL APPEARANCE IN THE COURT BELOW AND SUBJECTED ITS PERSON TO THE JURISDICTION OF THE COURT.

The statutes of Iowa prohibit special appearances as by section 3541 the mode of appearance may be, "by an appearance, *even though specially made* for any purpose connected with the cause, or for any purpose connected with the service, or insufficiency of the notice, and an appearance special or other to object to the substance or service of the notice shall make any further notice unnecessary."

This provision was first incorporated in the statutes of Iowa in the Revision of 1860, section 2840, previous thereto there was no statutory provision regulating appearances, though the courts of Iowa had frequently held, in the absence of any statute, that an appearance in an attachment suit was a general appearance.

Deshler *vs.* Foster, Morris, (Ia.) 403.
Clarke *vs.* Blackwell, 4 Greene, 441.

Chittenden *vs.* Hobbs, 9 Ia., 417.

Wood, etal, *vs.* Young, 38 Ia., 102.

In the case at bar the Woodbury County District Court acquired jurisdiction by the attachment of the defendant's property found within its jurisdiction, the proceedings were all in conformity with the statutes regulating attachments and the writ was executed by a seizure of property; to complete jurisdiction over the property, and to enable the court to condemn it, an original notice was served upon the defendant in Ohio (Record, 19), as is provided by statute, heretofore quoted, section 3537.

In apparent obedience to such notice and at the time required therein, but some months after the defendant's property was seized, it appeared in the state court, filed its petition and bond for nemoval, and when the cause was removed, filed the motion to quash the service of the notice, and to quash the attachment, which we are now considering, under its so-called special appearance.

In the earliest case in Iowa, arising under this statute, Justice Wright says: "There was always a seeming, if not an actual, inconsistency in permitting a party to come into a court of justice and say he was not there. But, however, logical and consistent this may have been, when he was brought in by a command of a summons, issued out of and under the seal of the court, there was never anything but absurdity in allowing him to say to a notice, 'I made an appearance specially, but I am not in court.' The reason and good sense of the thing is, that if he make an appearance for any purpose, the notice has then answered its purpose and a second one should not be required."

The Des Moines, Etc., *vs.* Vann, et al, 12 Ia , 523

In Lesure Lumber Co. *vs.* Insurance Co., 101 Ia., 514, it was claimed that the court acquired no jurisdiction over the person of the defendant, for the reason that the service of the original notice was had upon one not enployed in the general management of the business of the defendant, nor in any office or agency which belonged to it within the state; but the court said:

"But an action may be brought against an insurance company in any county in which the loss insured against, for which a recovery is sought, occurred. And an action aided by attachment may be brought against a non-resident in any county of the state where any part of the property sought to be attached is found. It is clear that the District Court had jurisdiction of the subject matter of the action, and it is also clear that under the statute of this state and the decisions of this court, the appearance of the defendant, although special, to object to the service of the notice was sufficient to confer jurisdiction upon the District Court."

The court below in the course of its opinion says, (Record 32) "In Chittenden *vs.* Hobbs, 9 Iowa, 417, it is held under this statute (section 3541) that an appearance by the defendant to quash an attachment was a general appearance to the action and rendered notice of suit unnecessary, but it is plainly indicated in the opinion of the court that if the appearance had been special for the purpose of objecting to the jurisdiction of the court it would not have had the effect that was given to it." But here the learned Circuit Court is again in error. Chittenden *vs.* Hobbs, was decided when there was *no statute upon the subject of appearances in Iowa,* and special appearances were tolerated. That case, as well as the case of Wood *vs.* Young, 38 Ia., 102, was decided under the law as it existed previous to the Revision of 1860, section 2840, which for the first time abolished the myth of special appearances, and it should also be borne in mind in considering this subject that it is not what the pleader christens his proceeding, but it is the relief asked which determines whether his appearance is special or general. An appearance may be in effect special even though it is not so called, and an appearance denominated special in the most emphatic terms may be in fact general.

It will be contended in this connection that the Iowa courts since the enactment of the statute governing appearances has recognized the right of a defendant to appear specially to object to the jurisdiction of the court over the person (though the point in issue in the case at bar is the defendant's right to appear

specially to obtain a release of its property in the legal custody of the court). The cases of Spurrier *vs.* Wirtner, 48 Ia., 486; Cibula *vs.* Pitts Co., 48 Ia., 528, and Murray *vs.* Wilcox, 122 Ia., 188, are relied upon as supporting this contention. But these cases are not rightly understood by either counsel or the court below and in fact have no application to the case at bar. The question of special appearance is not considered in any of these cases. There is a wide distinction between a special appearance, *eo nomine,* as defined by the general rules of the common law, to object to the service of process, such as is attempted to be made in the case at bar, and an appearance made for the particular or special purpose, whether special or general, and whether coupled with other defenses or not, of presenting the question of statutory bar to the action, or of personal privilege which forbids the court to proceed with the cause against the person.

In Spurrier *vs.* Wirtner, 48 Ia., 486, a positive mandatory provision of the statute, limiting the time within which an appeal should be taken from the board of supervisors had been violated. "The adjudication had become absolute." There was no special appearance made or claimed in this case. The appellee simply came into court and moved to dismiss the appeal for the reason that it was not perfected within the time required by the statute, and the court said: "It is evident that the rule in regard to an original notice, whose only office is to bring a defendant into court to answer to a petition duly filed, has no proper application to this case. * * * * If an appeal is not taken within the time required by statute, the adjudication becomes absolute. The successful party has the right to so consider it, and govern himself accordingly; any attempt to disturb that adjudication by appeal he has a right to resist at the threshold. A want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction."

The question of appearing for the purpose of moving for a dismissal of the action, for the reason that the petition was not

filed within the time specified in the original notice, as is provided by statute, was involved in Cibula *vs.* Pitts Co., 48 Ia., 528, and the court said: "Surely it is inconsistent with the rules governing the practice of the courts to hold that a defect in proceedings, which the imperative language of the statute declares shall work a discontinuance of the case, is waived by the party entitled to take advantage thereof, by his raising an objection thereto," and in speaking of the applicability of section 3541, governing appearance, the court further says: "This provision is applicable to cases wherein there are objections to 'the substance or service of the notice.' But the objection in this case is not to 'the substance or service of the notice,' it is to a proceeding *after service and contemplated by the notice,* the notice and service are perfect, and are sufficient to bring the defendant into court. Upon his appearance it is disclosed that an irregularity exists which the statute declares shall operate to discontinue the action."

In neither of these cases was there any question of special appearance involved. No special appearance was claimed; no objection to jurisdiction was claimed. The jurisdiction of the court was invoked to obtain a dismissal of the action as by statute required.

The case of Murray *vs.* Wilcox, 122 Ia., 188, is not rightly understood by the learned court below. While in that case the defendant objected to the method and manner of service, and that the court had not acquired jurisdiction over his person, he also moved a dismissal of the action for the reason that in the situation in which he was when served, he was immune from service, and the court decided the case upon the latter point, expressly holding that it had acquired jurisdiction over the person of the defendant by the service and in referring to the statute of Iowa relative to appearance, it uses the following significant language: "The object had in enacting the statute was to do away with allowing a party to specially appear for the sole purpose of advising the court that he is not there. It relates to the *acquirement* of jurisdiction of the person and not what shall be done with him after jurisdiction has been obtained. No exception

was taken by the defendant to the manner of service or to the character of the notice, *and he admits having been brought into court.* * * * * The service is merely the method of invoking jurisdiction. The immunity extends further and shields him from litigating a controversy in the place where he was exempt from service. If he had failed to appear this would have been a waiver of his privilege and a valid and binding judgment might have been rendered against him."

So we see that the appearance in these recited cases was not "to object to the jurisdiction of the court over the person or property of the defendant," as the court below erroneously assumes, but to invoke the jurisdiction of the court to enforce a statutory bar to the proceeding or to enforce a personal privilege of immunity.

In this connection we desire to call the attention of this court to the case of Moffitt vs. Chicago Chronicle Co., 107 Ia., 407, where the question of special appearance is fully discussed, and the cases of Spurrier *vs.* Wirtner, and Cibula *vs.* Pitts Co., *supra,* are explained, especially the principle announced in Spurrier *vs.* Wirtner, that "a want of notice is not waived by appearance, where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction."

But it is said that "this statute (Section 3541 of the Code of Iowa) seems to be inapplicable to the courts of the United States. Railway Co. *vs.* Denton, 146 U. S., 208-210. The question therefore is to be determined by the rules which obtain in these courts."

It is then pertinent to inquire why the Iowa statute relative to what shall constitute an appearance does not apply in the case at bar, and in that inquiry let us bear in mind that this was a case began in the state court, and if we obtained jurisdiction of either the defendant or its property under the laws of the state of Iowa, and the cause be rightfully removed to the United States court, "such court has jurisdiction to enforce all acquired liens and to administer such remedies as the state court could

and would have done if it had retained jurisdiction of the action."

Lackett *vs.* Rumbaugh, 45 Fed., 23, at page 32.

Section 914, Revised Statutes of the United States, provides: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District courts are held, any rule of court to the contrary notwithstanding."

It is beyond question that the statute of Iowa, Section 3541 quoted, governing appearances, relates to "practice and forms and modes of proceeding," and it is beyond question that the state statute in this regard is binding upon the United States courts, unless there is something in the Constitution or laws of Congress which its application would violate.

In this connection we desire to call the attention of the court to the language used in Amy *vs.* Watertown, 130 U. S., 301, where it is said:

"This review of the statutes shows that after 1792 it was always in the power of the courts, by general rules, to adapt their practice to the exigencies and conditions of the times.

But the statute of 1872 (Section 914) is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceeding must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the state."

It is contended that notwithstanding the statute of Iowa inhibiting special appearances the defendant in error, after removal, could appear specially in the United States Circuit Court to move to quash process and service of attachment. This can not be true. A party gains no rights by removal. If the proceeding which defendant in error took in the United States

Court would have constituted a general appearance if it had been filed in the state court, it must necessarily have the same effect if filed after removal in the United States Court.

The doctrine contended for is that although the defendant in error could not make a special appearance while the cause was pending in the state court it could do so after removal to the United States Court. We find no authority for any such contention, and upon principle it would seem that there could be none. It certainly can not be true that a party by removal of a cause from a state court gains the right or privilege of interposing defenses or of filing pleas which were not availing to him before removal. This special appearance was to plead to the jurisdiction, not of the United States Circuit Court, but to the jurisdiction of the District Court of Iowa, for whatever jurisdiction was acquired by the attachment and notice was acquired by that court, and the United Ctates Circuit Court simply succeeded to it; so it would follow that the test as to appearance conferring jurisdiction over the person should be applied under the rules of the state practice.

The cases of Harkness vs. Hyde, 98 U. S., 476, and Railway Co. vs. Denton, 146 U. S., 208, are much relied upon as supporting the theory of the defendant in error. But they are in nowise applicable to the case at bar.

Harkness vs. Hyde involves no question of statutory construction. Section 914 could have no application, for it was an appeal from a *territorial court,* and the objection was solely to the service of process upon the person. No question of jurisdiction over property was involved, and in that case we want to call the court's attention to the following language, which is pertinent to the case at bar: "It is only where property of a nonresident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations." In the case at bar there can be no denial but that the court had the custody and control of the attached property. The case of Southern Pacific Railway Co. vs. Denton,

146 U. S., 208, is relied upon with much confidence as establishing the broad doctrine that the laws of the several states governing what shall constitute an appearance are in no way binding upon the Federal courts. We contend that no such doctrine is there set forth, but on the contrary, that case is in entire harmony with Amy vs. Watertown, 130 U. S., 301, and only holds that if the application of the state law would result in the nullification of some act of Congress, then the state law must give way. This is all that Railway vs. Denton decides. That was a case, as we well know, where the suit was brought originally in the United States Circuit Court in a district which was neither the residence of the plaintiff or defendant, in direct violation of an act of Congress, and this court held that the defendant did not subject itself to the jurisdiction by appearing to urge this statutory right and that the Texas statute was not to be applied, because to do so would nullify an act of Congress. That case differs very much from the case at bar. This case originated in the state court, and the question of jurisdiction is to be tested by the laws of the state and the rules of practice in the state courts. In this case to apply the rules of practice of the state court governing appearances violates no act of Congress, and the rule laid down in Amy vs. Watertown, 130 U. S., 301, should be applied.

"The qualification contained in this phrase ('as near as may be') is not to be construed to subvert the command of the statute, but allows only necessary variations from the state methods growing out of the different organizations of the courts and other similar matters."

Lewis vs. Gould, 13 Blatchford, 216.

So the state statute of Iowa is not to be put aside in this case unless it is necessary so to do in order to give effect to some act of Congress, and that necessity has not been pointed out, nor does it exist. The Circuit Court of the United States can not ignore it unless it becomes necessary to do so in order not to do violence to some act of Congress, and no different doctrine can be found in any expression of this court. In Railway vs. Denton

this court refused to apply the Texas statute upon the sole and only ground that to do so would set at naught a mandatory statute of the United States. No such situation confronts the court in the instant case.

II.

TESTED BY THE RULES GOVERNING APPEARANCES IN JURISDICTIONS WHICH TOLERATE SPECIAL APPEARANCES, THE DEFENDANT'S APPEARANCE WAS GENERAL AND NOT SPECIAL. A SPECIAL APPEARANCE CAN ONLY BE PERMITTED TO QUESTION THE JURISDICTION OF THE COURT OVER THE PERSON, AND IF COUPLED WITH ANY OTHER MATTER OR OBJECTIONS IT RENDERS THE APPEARANCE GENERAL.

"An appearance is general if it is an absolute submission to the jurisdiction of the court. It is special if made for the sole purpose of objecting to the jurisdiction of the court over *the person* of the defendant, because there was no service, or because of defective service, of process, because of defects in the process or because the action was commenced in the wrong county."

"When in accordance with his rights a defendant wishes to raise the objection that the court is without jurisdiction *over his person* he must, according to the weight of authority, limit his appearance to that single question, or he will be deemed to have waived the objection."

"Where appearance is made for the purpose of objecting to the jurisdiction because of the absence of or defects in the process, or for defects in the service or return thereof, such special appearance does not, as a rule, give the court jurisdiction of *the person.*"

Cyc. Law and Procedure, Vol. 3, pages 502, 511, 527.

"It is a familiar rule that a general appearance waives any defect in the process and confers jurisdiction of the person. To avoid the effect of this rule it is the common practice, when it is desired to take advantage of any *defects in process* and to deny jurisdiction *over the person,* to appear specially for that purpose only. A special appearance is only proper when a party seeks to deny the jurisdiction of the court *over his person.*"

Ency. Pleading and Practice, Vol. 2, page 621.

"It is true that the defendant 'comes for the purpose of filing this motion and for no other purpose,' and had the motion been confined to the want of *proper service* it would not have operated as an appearance. It was not so limited, but embraced an additional reason, to-wit, the right of the court to hear and determine the subject matter. The rule is that when a defendant appears *solely* for the purpose of objecting to the jurisdiction of the court over the person such motion is not a voluntary appearance of the defendant, which is equivalent to service."

Elliott vs. Lawhead, 43 Ohio St., 171.

The above language is peculiarly pertinent to the case at bar, when we remember that even if it be conceded that the motion of defendant in error, besides objecting to the jurisdiction of the court over the person, did not object to the jurisdiction of the court over the subject matter of the action; yet it did also attack the jurisdiction of the court over the *res* of the action, the attached property and garnished funds, thus seeking to serve a dual purpose and obtain a release of its property from the custody of the court, which is something entirely distinct from the question of jurisdiction over the *person*, and it is hard to conceive how the defendant could either ask for or receive this affirmative relief without being in court.

Fitzgerald Const. Co. vs. Fitzgerald, 137 U. S., 98, was in its facts somewhat like the case at bar, and we believe that the principles therein announced are applicable to this case. In that case, as in this, "affidavit for attachment against defendant as a foreign corporation was made, order of attachment and garnishee summons issued and the latter served upon the Mo. Pacific Railway Co. as owing debts to the defendant." The garnishee answered somewhat as have the garnishees in this case.

The defendant filed a demurrer to the petition, afterwards filed its petition for removal and after removal filed an answer. Pending the trial the defendant filed a plea to the jurisdiction, and of this court in the course of its opinion says:

"By amendment to its answer, its plea and motions the

defendant insisted that the court had no jurisdiction to proceed, and thereby declined to stand upon the objection to service and submitted itself to the decision of the court in respect to jurisdiction over the subject matter, which jurisdiction it is entirely clear the court possessed. These proceedings were taken by the defendant after discovering the alleged ground of objection to the service, and there was no action on its part confined *solely to the purpose of questioning the jurisdiction over theperson.*"

It seems to us that the latter part of the above quotation is appropriate to the case at bar. Here the defendant did not confine its motion to the service of any process, either personal or in *rem,* but aside from objecting to the jurisdiction of the court over its person it went further and challenged the right of the court to proceed at all as against the attached property and garnished funds. No case can be found which allows an appearance so broad without in itself giving jurisdiction *in personam.*

The following extract also from the case of Fitzgerald Const. Co. vs. Fitzgerald seems to us peculiarly fitting to the case at bar. The question there, so far as jurisdiction *in personam* was concerned, was one of fraudulent service. The question here, so far as jurisdiction *in personam* is concerned, is service in a foreign state, and this court says:

"Nor are we impressed with the tenability of plaintiff's position in relation to the service in any view. Where a foreign corporation is not doing business in a state and the president or any officer is not there transacting business for the corporation and representing it in the state it can not be said that the corporation is within the state so that service can be made upon it. So that whether the president of this company was inveigled into Lancaster county or not, the service upon him amounted to no more than an informal notice only and did not bring the company into court, and this the company was bound to know and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly imma-

terial in view of the fact that the service was unavailing to bring the defendant into court unless it chose to come there."

In the case at bar the service was in Ohio, which was unavailing to confer any jurisdiction *in personam,* yet the defendant appeared in apparent obedience thereto and objected to the service of the notice upon itself, and also challenged the right or power of the court to condemn its property regularly seized and in the court's jurisdiction and custody.

"The motion which was made and sustained was too broad. It should have been limited to the single question of the jurisdiction of the court over the person of the defendant. The filing of a motion to dismiss the suit constitutes a general appearance. It is a waiver of all defects in the service by publication and gives the court jurisdiction of the person of the defendant."

Welch vs. Ayers et al., 61 N. W., 635 (Neb.)

"A party who makes several motions in a case other than to the jurisdiction of the court over his person will be held to have entered a general appearance for all purposes."

Abbott vs. Semple, 25 Ill., 91.

"The well defined theory of our jurisprudence is that the exception of want of jurisdiction *ratione personae* to be availing must be presented *in limine* and alone, and altogether disconnected with and disembarrassed by any other averment of fact which indicates the joining of issue."

State vs. Buck, 15 So., 531 (La.).

"The right to make a special appearance is not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure. Whenever a litigant appears to deny jurisdiction over his person which would otherwise exist but for the failure to pursue the methods prescribed by law for bringing him into court he must confine himself to that particular branch of jurisdiction."

Mahr vs. Union Pacific Co., 140 Fed., 921.

"It would be difficult to understand how the language of this assignment could be used for the sole purpose of challenging the jurisdiction of the court over the person. That to avoid an

appearance the objections must be confined to that purpose has been the holding of this court from its organization."

Perrine vs. Knights Templar, 101 N. W., 1017 (Neb.).

"When a person appears specially for the purpose of presenting the question of the jurisdiction of the court over his person he must restrict his motion to the ground of such jurisdiction and must not include therein some other ground that recognizes the jurisdiction of the court over his person and amounts to an appearance in the cause by him."

Dudley vs. White, 44 Fla., 264.

It is apparent from a consideration of the above authorities and others cited that a special appearance is only allowable to object to the jurisdiction of the court over the person. That is its sole and only purpose, and has been considered in that light by this court in its consideration of that subject.

Wabash Western Ry. Co. *vs.* Brow, 164 U. S., 271.

Who ever heard of, or what court ever held, that a litigant could appear specially to call upon the court to pass upon and determine its property rights?

Let us consider what the defendant's situation was when it made its appearance in this cause. Its property had been attached and was in the custody of the law officer of the court. There was no defect in the proceedings in the way of a want of proper affidavit or bond, or order of court, such as to make the seizure void for want of jurisdictional facts to sustain it. The property was within the territorial jurisdiction of the court, so that its seizure was not void. The defendant says that it appeared to object to the jurisdiction of the court over its property as well as its person. But its property was within the jurisdiction of the court and had been regularly seized. The defendant desired its release and appeared, not to object to the jurisdiction over its property, but in effect to invoke the jurisdiction and secure its return by setting up facts claiming an alleged superior right in the attached property in the way of immunity. If the defendant had not appeared the case would have proceeded, and if plaintiff's claim was established the attached property would have been con-

demned and ordered sold to pay such claim, and no one would ever have contended that such a judgment *in rem* would have been void for want of jurisdiction, and we believe that this is the test of jurisdiction. Would the judgment be void? If so there was no jurisdiction. If the judgment was not void, then there was jurisdiction.

It was the object of the defendant's appearance to prevent a judgment goin *in rem* against its property. None could go *in personam* against itself. This was an appearance to the very merits of the controversy. The object of the action was to seize and condemn the defendant's property. To prevent that condemnation the defendant appeared, and yet has the temerity to say it was not in court.

There is no question of jurisdiction involved in the attachment of this property, but it is a question of immunity or privilege of the *res* after it has been attached and jurisdiction acquired, and the defendant says in effect: "This property is sacred; on account of its high office it is privileged from attachment for its owner's debts." Can such a plea be made without subjecting the defendant's person to the jurisdiction of the court?

There was no appearance here to object to illegality of process or irregularity of service thereof, but to claim and establish by affirmative evidence an immunity from condemnation.

In Cooper vs. Reynolds, 10 Wall, 308, we find that this court has fully defined the term "jurisdiction." We quote briefly from this case, but refer the court to it in full as decisive upon the question that the court in this case acquired jurisdiction of the attached cars by their seizure, and any appearance to obtain relief from such attachment by the defendant in error conferred jurisdiction *in personam*. It is there said: "This right has reference to the power of the court over the parties, over the subject matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought, and this is conferred

by the sovereign authority which organizes the court and is sought for in the general nature of its powers, or in authority specially conferred.

Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. * * * * * * * * * * * *

When we come to the application of these principles to the case before us that which leads to some embarrassment is the complex character of the proceeding which we are to consider.

Its essential purpose or nature is to establish by the judgment of the court a demand or claim against the defendant *and to subject his property lying within the territorial jurisdiction of the court to the payment of that demand.* (Italics are ours.)

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction and can not be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that upon affidavit being made of that fact a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed whether he appears or not. * * * *

Now in this class of cases on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, *is the one essential requisite to jurisdiction, as it unquestionably is in proceedings in rem.* Without this the court can proceed no further; with it the court can proceed to subject the property to the demand of the plaintiff." (Italics are ours.)

In this connection we desire to call the court's attention to the case of Pennoyer vs. Neff, 95 U. S., 714, where the principles governing jurisdiction of state courts over persons and property

within their territorial limits are fully enunciated and the principles set forth in Cooper vs. Reynolds, *supra,* reaffirmed.

We conclude that any effort of the defendant in error by a special appearance to question the jurisdiction of the court over its person, and in the same motion to question jurisdiction over its property, was futile. If the court had no jurisdiction over the property there was no occasion for any appearance, special or otherwise, for any act of dominion of the court over such property would have been void. But the property was legally in the custody of the court under valid process and the defendant appeared *as a supplicant for the court's aid, and as a claimant* not only in its own behalf, but in the behalf of others, and invoked the jurisdiction of the court to establish and declare its property rights and prevent the judgment of the court condemning its property. In effect its plea was: "We may be indebted to you, but the property which you have attached is not liable for our debt, and we desire the aid of the court in securing its release." And yet the defendant never came into court?

In this connection we desire to also call the court's attention to the case of Freeman vs. Alderson, 119 U. S., 185, where it is said: "The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself *by appearing as a claimant in the case.*" (Italics are ours.)

The point we desire to emphasize, which the trial court seems to have overlooked, is that a party's property being attached and in the custody of the court, any appearance by him to seek redress necessarily calls for the affirmative action of the court, as is said in Freeman vs. Alderson, *supra:* "The property itself is the defendant," and the owner by appearing and seeking its release becomes an actor in the cause and substitutes himself for the property, and the action then proceeds as one *in personam* regardless of the action of the court relative to the property.

III.

The alleged special appearance of the defendant in error

contains many other matters and allegations of fact which in no event have any place in such an appearance, and necessarily rendered the same general.

It contains allegations relative to the subject matter of the action, and in effect challenges the jurisdiction of the court over such subject matter. These allegations are: "That this defendant railway company is engaged in the business of owning, operating and conducting lines of railway situate in the states of Indiana, Illinois and Ohio, and incorporated under the laws of the states of Indiana and Ohio, with its principal place of business in the city of Cincinnati, Ohio, and is not a corporation of the state of Iowa and has no line of road and has no agent or agency of any character in the state of Iowa." * * * * * * * *

"And that all of said cars so in the possession of said railway companies *in this state* belonging to this defendant *were attempted to be attached by plaintiff upon an alleged cause of action in favor of plaintiff and against this defendant by reason of the alleged wrongful causing of the death of plaintiff's decedent while a passenger on one of defendant's trains in the state of Illinois.*" (Record, 20-22.) (Italics are ours.)

These averments of fact have no office in a special appearance to object to jurisdiction over the person, nor to object to the jurisdiction of the court over property. The only object the pleader could have had in mind was to indirectly attack the jurisdiction of the court over the subject matter of the action, to-wit, the negligent causing of the death of plaintiff's decedent in the state of Illinois.

The original notice (Record, 19) speaks for itself and shows that it was served in the state of Ohio.

Jurisdiction over property does not depend upon its owner's residence nor place of business, nor does jurisdiction over person or property depend upon where the cause of action arose, hence we have here matters going directly to the jurisdiction of the court over the subject matter of the action.

It is clear, however, that the court in this case had jurisdiction of such subject matter.

It is the rule in actions for death by wrongful act, where the action is brought in a jurisdiction other than that wherein the death occurred, that such court will not entertain jurisdiction of the cause, unless by the laws of the forum a similar remedy is allowed, and we presume it was to invoke this rule that defendant in error made its guarded allegations in reference to the subject matter of the action. But in plaintiff's petition the Illinois statute in reference to actions for death by wrongful act were set up. (Record, 4.) Iowa has a similar statute. Section 3313 of the Code of Iowa provides:

"When a wrongful act produces death damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child or parent it shall not be liable for the payment of debts."

Sections 3443, 3444 and 3445 provide as follows:

"All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.

"The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter.

"Any action contemplated in the two preceding sections may be brought, or the court may on motion allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived."

In considering this question the Supreme Court of Iowa has held:

"Where a right of action accrues by virtue of a statute of any state the action may be maintained in the courts of any other state where the statutes relating to the same subject are of a similar import, though they be not precisely the same. Indeed, it would seem to be sufficient if the action be not contrary to the public policy or law of the state where the suit is brought. Ac-

cordingly where the administrator of the decedent had a right of action in the state of Illinois, under the statutes of that state, on account of the negligence of the defendant, resulting in the death of the decedent, *held* that the action was transitory and might be prosecuted in this state, the statutes of the two states relating thereto being substantially the same."

Morris *vs.* C. R. I. & P. Ry. Co., 65 Ia., 727.

The defendant in error having in its motion challenged the jurisdiction of the court over the subject matter of the action, and it being clear that the court possessed such jurisdiction, its appearance was thus converted into a general one. Somewhat similar allegations were considered in Mahr vs. U. P. Ry. Co., 140 Federal, 921, where they were held to constitute a general appearance. They certainly relate to the jurisdiction over the subject matter and have no place or office in a special appearance to object to jurisdiction over the person.

We have already adverted at length to the question of defendant's appearance to object to the jurisdiction of the court over its property, as well as over its person; but we desire to emphasize, that jurisdiction *in rem*—that is, over the property, had been established by its seizure. Thus far the property was the defendant. The proceeding was against it. There was no jurisdiction *in personam*. The property was found within the jurisdiction of the court. It had been regularly seized and in due course would have been by the court regularly condemned. The only way the defendant in error could avoid such condemnation was to appear, become an actor in the cause and show to the court reasons why its property should not be condemned, but should be released. Where one does this, by thus invoking the aid of the court to grant him affirmative relief, he must appear generally, for how can he invoke the aid of the court to release his property, and when this is accomplished say he was never in court?

But aside from the above considerations we see by the allegations of fact contained in the motion that defendant in error did not confine itself to setting up its own rights in the attached

property, but the substance of its motion was directed to urging the rights acquired by the garnishees therein by virtue of the alleged contracts set forth. It was the rights of the garnishees that were specially urged. It is certainly not the office of a special appearance to set up the rights of third parties in the subject matter of the suit, or *res* of the action. No authority can be found for any such contention.

This very question was considered in Foushee vs. Owen, 122 N. C., 360, which was also an attachment case, and the defendant made a special appearance to discharge the attachment, which seems to be allowable under the practice of that court. The special appearance, besides setting up defects in the process and proceedings, also alleged and set up the title and interest of a third party to the attached property, and the court said:

"The last two grounds urged for the discharge of the attachment were not such as could be made by a special appearance. They involved the finding of facts and such facts as the defendant had no interest in."

The defendant's entire motion is mainly devoted to the assertion of the rights of the garnishees in its attached property, thus by means of a summary motion, under the guise of a special appearance, seeking to secure the determination of issues already joined between the plaintiff and garnishees. It seems to us pertinent to inquire, How can the defendant call attention of the court to its contracts with third parties concerning its attached property by means of a special appearance to object to jurisdiction, especially when these third parties are all themselves in court?

The entire second division of defendant's motion under its alleged special appearance asserts matters which bear no relation to any question of jurisdiction, but therein it joins with the garnishees in their answer. It asserts that the garnishees are not indebted to it. It asserts that if any indebtedness is due from the garnishees to it the same is payable in Chicago.

The defendant's motion is not a motion, except that it is so called. It contains no matters permissible to be set up by virtue of a special appearance save the one statement that the plaintiff

acquired no jurisdiction over its person by the service of the original notice. But it does contain matters in its own behalf and in behalf of the garnishees, which under the laws of Iowa can only be urged by a suitable pleading under sections 3928 and 3948, heretofore quoted.

The motion was replete with allegations of fact having no reference to the acquirement of jurisdiction. It calls for the court's determination of these facts; process nor service thereof was not assailed except by indirection. We do not believe that legal lore contains such an anomaly as this alleged special appearance. It even goes so far as to dispute plaintiff's claim *in toto* by terming it an "alleged cause of action" "by reason of the alleged wrongful causing of the death of plaintiff's decedent."

IV.

AN APPEARANCE TO A WRIT OF ATTACHMENT TO MOVE TO QUASH THE SAME AND SECURE THE DISCHARGE OF THE ATTACHED PROPERTY IS A GENERAL APPEARANCE TO THE ACTION.

As has been before stated the defendant's main contention in its motion was to secure the release of its attached property and garnished funds. To be sure it styles its motion, "Motion to Quash and Set Aside Service," but the service was regular, and the matters set up in the body of the motion show that the object of the motion was to secure the release of the attached property on the ground of its alleged immunity from process.

We rely with much confidence upon this branch of the case upon the principles announced in an early case decided in the Supreme Court of Missouri at a time when special appearances were popular, and we commend the case to your honors' consideration as containing a logical exposition of the rules which should govern us, and as a common sense and legal view of a person's situation who appears in an action to invoke the aid of a court of justice to determine his rights in attached property. It is there said:

"If the defendant pleads to the action by alleging in his plea that he comes into court when and where he ought, this

admits the authority of the court over him in regard to the subject matter of the suit. But if he object to the lawful right of the court to take jurisdiction of him and his cause, then he says simply he appears, without adding the words, 'when and where he ought.' This mode of appearance only subjects him to the consequences of an appearance for the sole purpose of objecting to the jurisdiction of the court. There can in general be no difficulty in determining how far a defendant is bound by his appearance when his defense is to be made by a plea, for a plea must show whether the party appears to the action or for the purpose of objecting to the jurisdiction. But it very often happens that a defendant has a lawful right to come into court and do some act in regard to the proceeding against him, which can only be done by a motion, which has none of the formal parts of a plea about it. Then it often happens that the inquiry will arise, How far the defendant is to be affected by such appearance? I know of no exact test furnished by the law. But it seems to me the best rule to go by is to look at the nature of the act which the defendant does or attempts to do when he appears. In the case at bar the defendant's property was in the custody of the sheriff, who is the law officer of the court. There existed also in the court a complaint against him that he owed a debt and that he refused to pay the same. The property taken was to be kept by the law officer as a fund out of which the debt should be paid in case the defendant established his demand. The ends and objects of the suit and the attachment were to secure the payment of the supposed demand. The defendant's funds were tied up as security and he appeared to procure redress for being deprived of his funds. This I consider as an appearance in chief to the merits and to one portion of the substance of the suit. I can not see how it would be right to receive him to do this and permit him as soon as the attachment is dissolved to say he is no longer in court. When he appears to redress himself he ought to be required to answer, without departing the court, to the plaintiff's demand against him. Hence I conclude the defendant after he dissolved the attachment was still in court to answer to the plaintiff's action."

Whiting et al. vs. Budd, 5 Mo., 443.

The matter contained in the latter part of the above quotation is exactly fitting and peculiarly appropriate to the case at bar. The same principle is adhered to in Evans vs. King, 7 Mo., 411, and in Withers vs. Rogers, 24 Mo., 240, where it is said:

"But after the defendant made his motion to quash the return and to quash the writ he was in court, and the court ought not to have dismissed plaintiff's suit."

"By filing a motion to dismiss the attachment for a defect in the affidavit and other reasons which can only be considered after the court has acquired jurisdiction a prior motion to dismiss the action on account of a defect in the original notice is waived and a general appearance entered for the defendant.

By the filing of this motion to dismiss the attachment the defendant also made a general appearance to the action, so that the jurisdiction of the court over the person is unquestionable. By these motions the court was called upon to entertain and determine questions which could be considered only after jurisdiction had attached. A motion which calls into action the powers of a court for any purpose except to decide upon its own jurisdiction constitutes a full appearance."

Wood et al. *vs.* Young, 38 Iowa, 102.

This is the rule announced by the Supreme Court of Iowa, and let it be borne in mind that the above case as well as Chittenden vs. Hobbs, 9 Ia., 418, were decided as declaring the law as it existed previous to the enactment of any statute governing appearances and did not consider the inhibitory provisious now contained in section 3541 of the Code of Iowa.

"It requires a general appearance to enable the defendant to take action for the dissolution of attachment on grounds other than those apparent upon the record."

Waples on Attachment, 2d Edition, Sec. 702.

"The usual purposes of special appearances are to quash the proceedings for irregularities patent upon the record."

Waples on Attachment, 2d Edition, Section 656.

In Duncan vs. Wyckliffe, 4 Metcalfe (Ky.), 118, it is said:

"The only question is whether the filing of the affidavit to procure a discharge of the attachment was an appearance to the action.

The attachment authorized by Section 221 of the Code is not merely a proceeding *in rem*. The attachment authorized by said section is a provisional remedy in a personal action. It is not distinct and can not be separated from the action. If the petition shows no cause of action or if the cause of action which it states is successfully controverted the attachment must be discharged. It may therefore be assumed that a defendant desiring to controvert an attachment will present his defense to the action, if he has any. His motion to discharge the attachment, without presenting a defense to the action, authorizes the inference that he has no defense to the action. * * * * * * * * * *

Section 761 declares that "in an action where an attachment has been granted the execution by or for the defendant of a bond whereby the attachment is discharged, or the possession of the attached property is obtained or retained by him, shall be an appearance of such defendant to the action." We perceive no reason for making the execution of such a bond an appearance to the action, which does not equally apply to the filing of an affidavit controverting the attachment. The execution of the bond, being an act *in pais*, would not have been an appearance to the action if it had not been so declared by statute. The fact that it was so declared shows that the framers of the code regarded the action and the attachment as constituting but one proceeding. And in accordance with this view it has been decided by this court that an attachment may issue upon the statement of the proper facts in the petition, if sworn to, and in such case a separate affidavit is unnecessary."

The statutes of Iowa contain a provision similar to section 761 of the Kentucky Code mentioned above, and it is therein provided that "The execution of such bond (Bond to Discharge an Attachment) shall be deemed an appearance of such defendant to the action."

Code Iowa, Section 3907.

In a Kansas case where suit was brought a writ of attachment issued and service by publication had, a motion was filed in which the defendant challenged the jurisdiction of the court on account of the insufficiency of the notice of publication. In the same motion he also asked that the attachment be discharged for several reasons, one of which was that "the affidavit of plaintiff made to procure attachment in this action is not sufficient in law upon which to issue an attachment." In its opinion the Appellate Court says:

"The trial court held that, while the service was not good, the defendants below had by their motion waived the service and had submitted themselves to the general jurisdiction of the court. The ruling meets our approval. A motion made by a defendant for the special purpose of contesting the jurisdiction of the court does not waive notice nor confer jurisdiction, but if he appear for any other purpose it will be construed to be a general appearance in the case and give the court jurisdiction over him."

Gorham, etal, *vs.* Tanquerry, 58 Kan., 233.

Where a motion was filed by the defendant appearing specially asking that the action be dismissed, and that an order be issued that the plaintiff return property taken under the writ of replevin upon the ground that the property was of a value exceeding the jurisdiction of the court issuing the writ, and for the further reason that the property was removed out of the jurisdiction of the court within less than 24 hours after the same was seized under said writ, and for the further reason that no summons was ever served upon the defendant as provided by law, the court held the appearance a general one, and said: "Does the motion to set aside the service dismiss the action and order the plaintiff to return the property, though claimed by the defendant to be a special appearance, amount to such a general appearance as gives the court full jurisdiction of the case? The object and only office of a special appearance is the presentation of purely jurisdictional objections. If a defendant seeks to enter a special appearance, and in his motion sets forth both jurisdictional and non-jurisdictional grounds, it amounts to a general appearance, and the fact that

the defendant denominated it a 'special appearance' in his motion avails him nothing."

Nicholas & Shepard Co. *vs.* Baker, 13 Okla., 1.

"The motion to discharge the attachment was upon jurisdictional and non-jurisdictional grounds, and while it stated that the defendant entered a special appearance, it also attacked the attachment proceedings by alleging the insufficiency of the attachment affidavit. This was an objection to the merits of the attachment and was a general appearance in the action, and the defendant thereby waived any objections which she might have relied upon had she objected, *and on that sole ground to the jurisdiction of the court over the person of the defendant.* It is well settled, and particularly so under our code, that when a party attacks a proceeding of a court upon non-jurisdictional as well as jurisdictional grounds he has made a general appearance, no matter what kind of an appearance he may state in his motion he makes; and he thereby waives all jurisdictional defects over his person."

Raymond *vs.* Nix, 48 Pacific, 1110 (Okla.).

It will be said that there are cases which affirm the right of a special appearance to dissolve an attachment. That may be true under some codes and in some jurisdictions, but no such authority can be found in any of the United States Courts, and in those cases where the right is upheld they will on examination be found to be cases where the special appearance went to the attachment proceedings alone, and was disconnected with any objection to jurisdiction *in personam,* and furthermore in such cases jurisdictional defects in the proceedings or process were relied upon and the merits of the attachment were not questioned.

In the case at bar no jurisdictional defect was pointed out in the attachment proceedings or process. If the case had proceeded without the appearance of the defendant its property would have been condemned by the judgment of the court, and such judgment would not have been void for want of jurisdiction. But the defendant did appear, not to urge jurisdictional objections, but to assert its rights and the superior rights of the garnishees and of the public in the attached property, and invoked the judgment of

the court upon matters which presuppose jurisdiction, and asked for relief which could only be granted after jurisdiction has attached. The defendant appeared in the attitude of a claimant, not only in its own behalf, but in behalf of the garnishees.

Everything necessary to be done to confer jurisdiction upon the court over the *res* of the action had been done. See Wade on Attachment, Chapter IV. Any appearance by defendant in error to question that jurisdiction was futile. It was complete. The defendant could only urge reasons for the release of its property, and this is what it did, and thus made a general appearance.

Consider the questions of law and fact which the court was obliged to pass upon and did pass upon in arriving at its conclusion. The court had to find that there were in existence the contracts set forth in the defendant's motion; that these contracts created certain obligations upon the defendant and gave the garnishees certain rights, and to protect these alleged rights of third parties it found that the cars were engaged in interstate commerce, and as a conclusion of law it found that they were therefore not subject to attachment. All of these findings are remote from the elemental proposition of jurisdiction and could only be made after jurisdiction had attached.

V.

The record shows that this action was dismissed and a judgment rendered in behalf of the defendant in error and against the plaintiff in error for costs (Record, page 40), and that this action was taken upon motion of the defendant in error. We have then this paradoxical situation: The defendant in error has obtained a dismissal of the case against it and has a money judgment in its favor against the plaintiff in error, and yet protests that it was never in court.

This court has held that a judgment, for costs even, can not be rendered against a defendant who has not appeared or been personally served within the jurisdiction. Freeman vs. Alderson, 119 U. S., 185; *eo converso*, how can a defendant obtain a judgment in his favor for costs unless he is in court?

The defendant in error, apparently not satisfied with the

judgment of May 22 (Record, page 39), on June 6 procured on its motion the further judgment set out at page 40 of the Record, which judgment quashed the service of notice (erroneously typed "motion" in the Record) upon the defendant, dismissed the action and rendered a money judgment for costs in favor of the defendant.

The motion and judgment were too broad, and the action taken could only be after jurisdiction had fully attached.

In the judgment there is no finding upon the question of jurisdiction. It is true that the court in its opinion indicates that it could not entertain the cause for lack of jurisdiction, but the opinion is no part of the judgment. So far as the judgment entry of June 6 is concerned it is complete, and renders every issue in the cause *res adjudicata*. It is a decision upon the merits, and it is impossible to conceive of such a judgment being rendered except the court had jurisdiction. It was error to dismiss the plaintiff's cause. The petition stated a good cause of action. Though the attachment was dissolved, that was no reason why the court should dismiss the cause and render judgment for costs. The defendant could not move for such relief without subjecting itself to the jurisdiction of the court for all purposes.

"It would not be proper to dismiss the cause, even though jurisdiction of the defendant's person was lacking."

Everett *vs.* Wilson, 83 Pac., 211 (Cal.).

"Qualified appearance is of avail only when the writ or service is defective, and in the absence of such defect it becomes a general appearance."

Smith *vs.* Smith, 15 Pa., Sup, Ct., 366.

"A motion to quash a summons because of defects therein, or in serving the same, should be confined to the defects complained of. If it go farther and pray for a dismissal of the action it is a general appearance in the action, as it invokes the power of the court on a question other than that relating to its jurisdiction."

Bucklin *vs.* Strickler, 49 N. W., 371 (Neb.).

In a similar case the Supreme Court of Washington has said:

"We are of the opinion that a writ of restitution when issued at the commencement or during the pendency of an action is governed in the main by the same principles of law as a writ of attachment or other ancillary process in the main case. The appellant's position is that the action abated when the original summons and service thereof were quashed and set aside, and therefore carried the proceedings for the writ of restitution with it, as an incident, and that the trial court erred in not quashing the writ and dismissing the case. There would be much force in appellant's contention if he had not asked the court below to dismiss the action. The appearance of the appellant was, in form, special for the purpose of objecting to the court's jurisdiction over his person, but in the body of his motion he invoked the jurisdiction of the court below on the merits when he asked for a dismissal. A party desiring to successfully challenge jurisdiction over his person should not call into action the powers of the court over the subject matter of the controversy. By so doing he waives his special appearance and will be held to have appeared generally.

Teater *vs.* King (Wash.), 76 Pac., 688. (35 Wash. 138)

It is pertinent to inquire how it is that the defendant in error has obtained a general judgment for costs against the plaintff in error without any appearance in court: This judgment is enforceable by execution, and whatever money should be coming to the defendant in error would be returned to it upon the realization of the same upon execution or otherwise, can a litigant have a judgment in its favor without being in court?

The plaintiff in error had a most meritorious cause of action, accruing to him, by virtue of the laws of a sister state, for the death of his decedent. The acts of negligence on the part of the agents and employees of the defendant in error were most flagrant and criminally careless. As was the undoubted right of the plaintiff in error, by virtue of the statutes of Iowa, he commenced this action in the courts of Iowa and obtained jurisdiction by the attachment of defendant's property. This jurisdiction the defendant in error attempts to deprive the plaintiff in

error of by appearing in the dual role of claimant of its property, and objector to any jurisdiction over its person, setting up affirmative matters in its own behalf and in behalf of the garnishees, by which it claims its property should be discharged from the seizure, and yet tells the court that it itself is not where it seems to be; that is, in court.

In conclusion let us urge that we regard as established by the authorities:

1. That the court had jurisdiction in this cause from the moment that the sheriff levied the writ of attachment upon the first freight car and served the first notice of garnishment. That the commerce clause of the United States Constitution was never intended to prevent the operation of the ordinary sequestration laws of a state, though the enforcement of such laws might affect or interfere with interstate commerce.

We consider this phase of jurisdiction, *in rem*, effectually disposed of by numerous decisions of this court, particularly in point, being, Iroquois Transp. Co. vs. Delaney, 205 U. S., 354, (The Winnebago) and Johnson vs. Chicago & Pacific Elevator Co., 119 U. S., 388, 398.

2. That the defendant in error could not by a summary motion have the question of the existence of the contracts between it and the garnishees passed upon or determined, nor any rights of such garnishees investigated.

That the motion filed by the defendant in error should not have been considered for the reasons:

That its material allegations were controverted by the resistace of the plaintiff in error, and thus their truth did not "clearly and satisfactorily appear."

That it contained matters raising the same issues in behalf of the garnishers, already joined between the plaintiff in error and the garnishees, which issues could not be considered under, and had no place in a special appearance, and rendered such appearace general.

That the affdavit in support of said motion was made by one who averred no knowledge of the facts alleged, showed no means

of knowledge and stated no facts from which such knowledge could be inferred, and thus lacked the most essential element of an affidavit, made by one not a party to the action, and rendered the motion nothing more than a "fugitive paper" filed in the cause and totally lacked any evidentiary worth.

The decision of the court below was based entirely upon the *ex parte* affidavit of this man Higgins, who does not even disclose his knowledge, means of knowledge or any facts from which knowledge can be inferred, save the bare allegation that he is "Auditor of Disbursements of the Defendant Company." Can a case of such magnitude be disposed of in such a summary and *ex parte* manner? Tidrick vs. Sulgrove, 38 Iowa, 339; McLaren vs. Hall, 26 Iowa, 297, and Rausch vs. Moore, 48 Iowa, 611, are decisive authorities to the contrary upon the foregoing propositions.

3. Under the statutes of Iowa, Section 3541, heretofore quoted, the appearance of the defendant "for any purpose connected with the cause," or to object to the service of notice, rendered such appearance general.

But in any event the motion filed by the defendant contained such manifold allegations of fact entirely unconnected with any question of jurisdiction over the *person* of the defendant as to render such appearance general. It surely can not be the rule that in a proceeding essentially *in rem* a defendant can appear and have its rights in property adjusted without submitting its person to the jurisdiction of the court. We consider the principles announced in Whiting vs. Budd, 5 Mo., 443, and Wood vs. Young, 38 Iowa, 102, as decisive upon this point.

The court having jurisdiction of the *res* of the action, the attached property, any appearance to question that jurisdiction and at the same time question the jurisdiction *in personam* would fall under the same rule as an appearance to object to the jurisdiction *in personam* and over the subject matter. The court having jurisdiction over the *res* of the action, any appearance by the defendant would confer jurisdiction *in personam*.

With full confidence that this court will correct the errors

complained of and set this much vexed question at rest once and for all, we respectfully submit this brief.

ELBERT H. HUBBARD, of Sioux City, Iowa.
WILBUR OWEN, of Sioux City, Iowa.
For Plaintiff in Error.

The Supreme Court of the United States

OCTOBER TERM, 1909.

No. 123

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, PLAINTIFF IN ERROR,

vs.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, DEFENDANT IN ERROR.

REPLY AND SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

POINTS AND AUTHORITIES.

I.

ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

This cause is such a one as is clearly contemplated by the 5th Section of the Judiciary Act of 1891 providing for the certification of questions of jurisdiction directly to this Court from the Circuit Court, and is governed by the rule announced in *Shepard vs. Adams*, 168 U. S., 618. It involves the question of the original acquirement of jurisdiction over the defendant in error and "this Court can reverse the Court below, when clearly wrong, even upon questions of fact."

Com. Mutual Accident Co. vs. Davis, 113 U. S., 245.

II.

UPON THE QUESTION OF WHETHER OR NOT FREIGHT CARS ARE SUBJECT TO FOREIGN ATTACMHENT.

Since the filing of our former brief numerous decisions have been handed down by various state courts, upon the question of the liability of freight cars to tbe process of foreign attachment. One or two of these cases the defendant in error noticed in its brief, we desire to cite them all to this Court.

De Rochemont vs. N. Y. C. & H. R. R. Co., 71 Atl. (N. H.) 868.

Southern Flour & Grain Co. vs. N. P. Ry. Co., et al., 127 Ga., 626 (56 S. E. 742.)

Southern Ry. Co. vs. Brown, 62 S. E., 177, (Ga.)

M. P. Ry. Co. vs. Kennett, 99 Pacific 269, (Kan.)

Harvard Law Review, Vol. 20, page 319.

Shore & Bro. vs. B. & O. R. Co., 76 S. C., 472.

Seibles vs. Northern Central Ry. Co., et al., 61 S. E. 435, (S. C.)

III.

The rights or interests of garnishees or other third parties in the attached property can not be considered in such a summary motion or proceeding as was had in this case. The defendant can not assert their rights for them by a special appearance.

De Rochmont vs. N. Y. C. & H. R. R. R., 71 Atl., 868 (N. H.)

IV.

Property of the defendant in the possession af another, may be seized upon attachment under the laws of Iowa, either by direct manual seizure, or by garnishment of the party in whose possession the property is found. See sections 3896, 3897, 3935 of the Code of Iowa, set out at pages 6, 7 of our original brief. Section 3898 of the Iowa Code quoted at page 6 of its brief by defendant in error refers to "property capable of manual delivery and attached *otherwise* than by garnishment."

In this case the cars were *actually manually seized*, as shown by the returns of the sheriff. Record, page 17, and the diffeeent companies in whose possession the cars were found were also garnished. (Record, page 16.)

V.

AS TO DEFENDANT IN ERROR'S SPECIAL APPEARANCE.

It is now conceded by defendant in error in its argument on its motion to dismiss the writ of error that the contention that the cars were not subject to attachment because exempt under the Commerce Clause of the Constitution and Acts of Congeess thereunder, "*does not present the question of jurisdiction of the Court*, but as to whether the property is so exempt."

Brief of defendant in error, pages 4, 5.

That being conceded, then its special apperance was not for the purpose of raising jurisdictional questions alone, and must be held to be a general appearance, conferring jurisdiction *in personam*.

ARGUMENT ON BRIEF.

I.

Defendant in error in its brief on its motion to dismiss the writ of error and in its amendments thereto, has become wofully confused as to the meaning of Section 5 of the Act of March 3, 1891, providing for the certification of questions of jurisdiction direct to this Court from the Circuit Court, and have confounded the provisions of Section 6 of the same Act regulating writs of error from the Circuit Court of Appeals with the provisions of Section 5. The distinction between the two sections is clearly pointed out in one of the cases cited by defendant in error.

Ayres vs. Polsdorfer, 187 U. S., 585.

None of the cases cited by defendant in error have any bearing upon the question now before this Court, but most of them are based upon an interpretation of Section 6 of the Act of 1891 which applies to the Circuit Court of Appeals.

This was a case of the complete denial by the Circuit Court of jurisdiction over the property or the defendant or of the person of the defendant, and involves a determination in the first instance of the sufficiency of the process and means employed to bring the defendant into court, and is similar to, if not identical with a determination of jurisdictional questions involved in certification from the Circuit Court in other cases considered by this Court heretofore cited by us; the most recent of which is the case, *Com. Mutual Accident Co. vs. Davis*, 213 U. S., 245. That was a case begun, as was this, in the State Court against a foreign corporation, service being had upon an alleged agent transacting business within the state. A removal was had to the Federal Court, where a special appearance was made for the purpose of questioning the jurisdiction of the Court, which was exactly what was done in the instant case, the ruling being adverse, the question of jurisdiction was certified to this Court, which held, "Under Section 5 of the Act of March 3, 1891, this Court has jurisdiction to review cases certified in which the question of jurisdiction alone is involved, and under the power conferred by that statute can reverse the Court below, when clearly wrong, even upon questions of fact."

That the cause originated in the State Court and the question of jurisdiction could have been raised in that Court, if the cause had remained there makes no difference under the authority of the above case.

Remington vs. C. P. R. Co., 198 U. S., 95.

Board of Trade vs. Hammond Elevator Co., 198 U. S., 424.

The defendant in error now takes a position directly opposed to its position taken in its alleged special appearance. Its special appearance could only be allowed for the sole and only purpose of objecting to the jurisdiction of the court, and its special appearance so recites. It has always been the contention of the plaintiff in error that an appearance to obtain a discharge of at-

tached property on the ground of its alleged exemption, was not a special appearance, for it raised no jurisdictional question, but invoked the jurisdiction of the Court to decide the question of immunity.

The contention of the defendant in error in the Circuit Court was that the question of immunity was a jurisdictional question, such as could be raised by a special appearance, and in this contention it was sustained by the opinion of the Court below, and certified to this Court that "the sole question considered and determined by the Court was that the Court had no jurisdiction over the person of the defendant or of the property involved." (Record, page 41.) Yet in the face of this certificate and in the face of the recitals of its own motion which furnished the foundation for the holding of the lower Court, and which say, that it "objects to the jurisdiction of the Court over the defendant, and also of its property." (Record, page 20,) it now in this motion, addressed to this Court gravely informs your honors that the question presented by its special appearance was "not one of the jurisdiction of the Court, but as to whether the property was exempt." (Amendment to Motion to Dismiss, page 4-5.) If that is true then that question had no place in a special appearance.

Its position now, however, is in entire harmony with our contention, but in the lower Court it contended, and the Court decided that it was a question of jurisdiction, and to review that decision we obtained the certificate for a review.

II.

Since the preparation and filing of the original brief in this cause, several cases have come to our notice which consider the question as to whether or not the attachment of cars is a violation of the Interstate Commerce Clause of the Constitution of the United States and Acts of Congress thereunder.

A brief review of these cases may be beneficial.

The first of these cases in point of time is the case of *Southern*

Flour and Grain Co. vs. N. P. Railway Co., et al., found in 127 Ga., 626, 56 S. E., 742, decided March 1st, 1907.

This was a case in which the principal defendant, the Northern Pacific Raliway Co., took no part, but arose and was decided upon the *uncontroverted* answer of the garnishee, The Western and Atlantic Railroad Company. The Court says, "The only contention made before us by counsel for plaintiff in error is, that a certain railroad car, the property of the Northern Pacific Railway Co., the defendant in attachment, which came into the hands of the garnishee, the Western & Atlantic Railroad Co., *within the jurisdiction of the Court*, after the execution of the attachment by service of the summons of garnishment and before the garnishee filed its answer to the summons of garnishment, is subject to the attachment.

The garnishee insisted that the car was not subject to attachment, and set forth in its answer to the summons the facts upon which it contended that the property was not subject. There being no traverse to the answer of the garnishee, the Court, upon motion and consideration, discharged the garnishee and dismissed the attachment. The plaintiff in error was plaintiff in the Court below and excepted to the ruling of the Court. The answer of the garnishee in effect sets up two theories under which it was insisted that the Court should not require the garnishee to surrender the possession of the car, to-wit: (a) That the garnishee had the right to the use of the car superior to the right of the garnishing creditor. (b) That the car being employed in interstate commerce, it would be a violation of the Federal Constitution and statute upon the subject of interference with interstate commerce to require the surrender of the car."

The first point considered by the Georgia Court in the above case, that is, the superior rights of the garnishee, need not be noticed here, except to say that under the uncontroverted allega-

tions of its answer the Court held the garnishee's right the superior one, under its contract for the use of the car.

The instant case presents no such question to this Court, for, as we have before pointed out, the answers of the garnishees were all controverted as provided by law, and similar allegations contained in defendant's motion to quash were also denied, and neither the garnishees nor the defendant averred any desire or intention to use the empty cars for a return shipment. Moreover, this does not present a case where the garnishees are before this Court, it was without any warrant or authority that the Court below considered their alleged rights, under a special appearance by the defendant which could only present jurisdictional questions.

But the opinion of the Georgia Court upon the question of interference with interstate commerce, is interesting and pertinent to the issue in the case at bar; it proceeds:

"We may now consider whether the attempt on the part of the garnishing creditor to take this car by means of the garnishment process is violative of the Federal Constitution and statutes upon the subject of interfering with interstate commerce. The car came into this state under circumstances which are sufficiently stated in the foregoing division of this opinion. It was a vehicle of transportation, which brought from another state a load of wheat consigned to a point within this state. There was no attempt to serve the attachment by direct seizure of the car, so as to interrupt the due transmission of the freight; but the execution of the attachment was attempted by service of the summons of garnishment. While the garnishment might ultimately impound the car, the service of the writ was perfectly consistent with the right of the garnishee to continue its use to the point of destination and there to discharge the freight, this being true, it may be regarded as a matter of fact that the levy of the attachment by service of the summons of garnishment did not in any manner interrupt the

transportation or delivery of its freight. A mere statement of the facts renders it manifest that, as affects either the freight which the car brought into the state, or the business of transporting the same, there was no interference whatever, and it follows, of course, that if there was nothing further involved, the car would not be exempt upon the theory of unlawfully interferring with interstate commerce.

"It is insisted further, however, that the car is a part of the equipment of a railroad company employed generally in the handling of interstate and intrastate freight, and employed at this particular time only for the purpose of bringing from a point without this state a load of wheat to be discharged within the state, with the possibility of being reloaded with freight destined to points either within the state, or beyond the limits of this state, and, after being so loaded, returned in the direction from which it had come. It is readily seen that there is a time while in this state that the car becomes empty, and returning, may or may not be employed in the business of transportation. The fact of present transportation of freight is therefore eliminated. The question finally is resolved into this, is an unloaded car, which is generally employed by a steam railroad company as a part of its equipment in the transportation of freight from one state to another, exempt from the process of attachment regularly instituted for the collection of a debt? Such is the case before us and we proceed to deal with the law applicable to such facts. The attachment laws with which we are dealing are not in conflict with the state Constitution, and there is no attack made upon their validity. They may be regarded therefore as valid in all respects. There is no purpose of these attachment laws except the enforcement of the payment of debts. Such purpose is not only legitimate, but essential to the maintenance of the commercial and industrial welfare of the state. It is proposed in this instance to employ the writ of attachment only for this

purpose. Rights of this kind may be enforced by any member of the public in any well founded case. It may sometimes happen that the prosecution of such right for the legitimate purpose of collecting a debt may incidentally affect interstate commerce, but it does not follow that, merely because of such incidental effect, the Courts will always enjoin the prosecution of the otherwise legitimate right. This principle has been recognized a number of times by the Supreme Court of the United States, though not in any case involving the collection of a debt. A case involving the application of the principle to the right of levy for the collection of a debt has not been before that Court. The cases in which they have applied the principle are those involving occupation tax, public morals, public convenience, health of people and animals and similar cases." (Citing cases.)

(The learned Supreme Court of Georgia in its closing sentences of the above has evidently overlooked the decisions of this Court heretofore cited in our brief, viz:

Iroquois Transportation Co. vs. De Laney, 205 U. S., 354 and *Johnson vs. Chicago and Pacific Elevator Co.*, 119 U. S., 388, for both of these case were attempts to enforce collection of debts against steamboats engaged in interstate commerce, and the right was sustained upon practically the same reasoning set forth in the Georgia case.)

Continuing, the Supreme Court of Georgia says, "But after all the argument in each case leads to the conclusion, that, if the thing attempted is in pursuance of a valid state law, its enforcement will not be stayed only because it may incidentally affect interstate commerce. The principle is applicable to the case at bar, and the plaintiff should not be precluded from collecting his debt by impounding the car in the manner attempted, because of the incidental effect it may have upon the general use of the car in the matter of transporting interstate freight, to hold otherwise would in effect be to render immune from the payment of debts

all property of railroads employed in interstate traffic. Such a proposition does not rest upon sound reason. What we have said seems not to be in entire harmony with some Courts. *Davis vs. Cleveland R. Co.*, 146 Fed., 403." (The instant case.) "*Wall vs. N. & W. R. Co.*, 52, W. Va., 485; *Connery vs. Q. O. & K. C. R. Co.*, 92 Minn., 20. But the rulings in these cases are not controling, and we do not, by the force of their reasoning, feel drawn to a conclusion different from that already stated. The decisions to which we have alluded as entertaining a contrary view are interestingly criticised in Harvard Law Review, Vol. 20, pp. 319, 320."

The article in the Harvard Law Review above mentioned is worthy of notice. It is a criticism called forth by the decision of Judge Reed rendered in the case now before your honors, and found in Vol. 20, page 319.

We quote as follows:

"ATTACHMENT OF ROLLING STOCK AND GARNISHMENT OF CARRIERS IN RELATION TO INTERSTATE COMMERCE.

"If a state law amounts to a regulation of interstate commerce, and certainly if this regulation is contrary to the intent of Congress express or implied, the law is unconstitutional. Under this principle a state law was recently held invalid in so far as it authorized the attachment of the rolling stock of a non-resident carrier, and the garnishment of connecting carriers owing freight collections to the non-resident carrier. *Davis vs. Cleveland, etc., Ry. Co.*, 146 Fed. Rep., 403. (The instant case.)

"The cars attached were in the hands of the garnishees under the usual agreement to forward them to the destination of the freight and return them later to the owner. The Court followed the only other cases which have considered the attachment law in relation to interstate commerce. With one exception these cases do not expressly suggest that a domestic attachment of cars running on thier own line would be unconstitutional

though the cars were engaged in interstate business. They jump to a consideration of the extra burden upon the defendant of meeting a suit in a foreign jurisdiction, and the burden upon the garnished connecting carriers, with consequent discouraging effect upon the forwarding agreement, finding that the whole proceeding is contrary to the intent of Congress expressed in the statute authorizing carriers in different states to arrange for continuous carriage.

"This reasoning proceeds upon an infirm distinction. The line should be drawn, not between the attachment of the cars of a resident or non-resident, but between an attachment which directly prevents the delivery of interstate freight in the cars, and one which does not. The garnishment certainly, and the attachment in so far as it does not tie up interstate freight, do not amount to regulations of interstate commerce at all. Their real and proper purpose is to secure the payment of debts, and they affect only indirectly, interstate commerce. . . . . .

"An analogy for the difference between an attachment which directly ties up interstate freight and one which does not, may perhaps be found in cases which hold that there may be a valid attachment of a mail boat while the mail is not on board, but not of a mail boat which is in actual use."

The next case, in point of time, which involves the question of attachment of cars is that of *Shore & Bros. vs. B. & O. R. Co.*, 76 S. C., 472, 57 S. E., 526, decided March 28, 1907.

This was a case where a car belonging to the Baltimore & Ohio Railroad Co. was seized by attachment while in the possession of the Atlantic Coast Line Railroad Company. The car when seized was standing upon the tracks of the latter named company at Sumter, S. C., *loaded* with hay, whether or not Sumter was the destination of the freight contained in the car does not appear, but the opinion recites that the car was "loaded with interstate freight not delivered to the consignee."

The principal defendant, the B. &. O. R. Co., made no appearance or defense of any kind in the action. The case was determined upon the petition of intervention of the Atlantic Coast Line Co., in whose possession the car was when attached. In its petition the intervenor set up a "right of possession and use of the car as a bailee for hire under an agreement with the B. & O. Co., known as the 'Per Diem Agreement of the American Railway Association,' the terms of which were set forth in the answer, and further alleged that the car when attached, was engaged in, and was an instrumentality of interstate commerce and was not liable to seizure under said attachment. The plaintiffs demurred to the answer on the ground that the facts stated do not entitle the intervenor to any relief under Section 255a, and upon this the issue was framed. Judge Purdy, before whom the issue was tried, held in effect, ...(2) That the B. & O. R. Co. could not have taken the car from the possession of the Atlantic Coast Line R. Co. until it was *unloaded*, and after the expiration of the time under the agreement to exercise the right to retain the car *loaded*, and the attaching creditor could have no higher right to do so. (3) That the statute regulating the attachment of railroad cars in use can not be so construed as to authorize attachment of a car of a foreign corporation, *while in use* in this state as an instrumentality of interstate commerce." (Italics are ours.) . . . . . "The real question therefore is whether interstate commerce law protects the property from attachment in the hands of intervenor. We agree with the Circuit Court that it does. . . . . .The facts of the case show not only that the car attached was the car of a foreign corporation in the hands of the Atlantic Coast Line, as *bailee for hire* but was an instrumentality of interstate commerce, *and actually in use as such when attached, being loaded with interstate freight not delivered to the consignee.*" (Italics are ours.)

The Supreme Court of South Carolina again considered this

question in the case of *Seibels vs. Northern Central Ry. Co.*, et al., in 61 S. E., 435, decided April 12, 1908.

In this case the appeal was from an order refusing to vacate an attachment levied at the instance of the plaintiff, upon an empty freight box car belonging to one of the defendants, N. Y. C. & H. R. R. Co., found in the yard of the Seaboard Air Line Ry. Co. at Columbia, S. C.

The motion to vacate was apparently made by the defendant, owner of the car, N. Y. C. & H. R. R. Co.

The Court said, "The undisputed facts appear to be that the car when attached was on a side track empty, after having come into the state loaded with an interstate shipment of flour, and was there temporarily in the possession of the Seaboard Air Line Ry. Co. *under contract* with the appellant to promptly return within a reasonable time, and to pay per diem demurrage for delay, and for the purpose of *taking back another carload of freight*, if such were ready for shipment within a reasonable time."

Following the case of *Conney vs. Q. & Q. Ry. Co.*, 92 Minn., 20, the Supreme Court of South Carolina held that under the circumstances stated the car was not subject to attachment, in that it would be violative of the interstate commerce clause of the Constitution and statutes passed under its authority. But in their zeal to uphold the U. S. Constitution both the Minnesota court and the South Carolina court have pressed far beyond the intent and meaning of the Constitution and these statutes and have gone far beyond anything warranted by the decisions of this Court. The opinion in neither case cites any authority from this Court as warrant for their remarkable holding. As is fittingly remarked in the Harvard Law Review, Vol. 20, 319: "They jump to a consideration of the extra burden upon the defendant of meeting a suit in a foreign jurisdiction." This is not a constitutional question nor is it a question of jurisdiction, and finds its best answer in the opinion of Judge Gary in the South

Carolina case just cited, dissenting upon this point. That is the seizure of empty cars, he says, "The next question is whether there is error in refusing to vacate the attachment on the ground that it was an interference with the interstate commerce clause of the Federal Constitution. The burden rested upon the appellant to set forth such facts as showed that the box car was exempt from attachment by reason of the fact that it was being used as one of the instrumentalities of interstate commerce. The affidavit of W. A. Duncan fails to show that the car was in actual operation at the time of attachment, and it is a significant fact that the said affidavit likewise fails to make it appear how long the car had been standing upon the stide track idle and empty. Furthermore, the affidavits introduced by the plaintiffs tended to show that a reasonable length of time had elapsed after the car had been in actual operation for the purposes of interstate commerce. . . . . The facts of this case are quite different from those in *Shore & Bros. vs. R. R.*, 76 S. C., 472, as in that case the car attached was loaded with produce which had been consigned to a person in Sumter where the car was attached."

Southern Ry. Co. vs. Brown, et al., found in 62 S. E., 177, and decided August 12, 1908, is another case involving the attachment of railroad cars. This was a case peculiar in its facts. Brown, the defendant, swore out an attachment vs. the Mobile & Ohio Railroad Co. upon the ground of non-residence and levied upon a freight car belonging to that company, which was in possession of the Southern Ry. Co. The principal defendant, M. & O. Railroad Co. did not appear or defend. The Southern Ry. Co. in whose possession the car was when found, sought an injunction against Brown and the sheriff, to restrain them from selling the car.

On the hearing it introduced a written contract, giving it a right to use the car so attached for a return shipment, and it claimed certain rights under that contract and set up certain

facts which made it necessary for it to use this particular car, which are fully set forth in the opinion. The car was standing upon a spur track of the plaintiff, empty, when attached. .

The Court granted the injunction, conditioned upon the plaintiff returning the car when its right to use the same had ceased. From this order the Southern Ry. Co. appealed. The Supreme Court of Georgia in the course of its opinion say, "The car levied on in this case was not in actual use at the time of the levy. Its seizure therefore at this time did not immediately interfere with the duties of either of the railroads or with interstate commerce. If the seizure and sale of this one car might create such interference at some time in the future, it did not do this at the time of the seizure, as the car was then empty and idle. The fact that a creditor in the prosecution of his rights to collect a debt by attachment of the property of his debtor, a non-resident railroad corporation, which is a common carrier, may by the levy and sale of an empty and idle freight car of the debtor, incidentally affect future interstate commerce, will not render such proceeding illegal. If such idle and empty freight car was not subject to levy in Georgia because it was an instrument of interstate commerce, it would not be subject to levy in the state af the residence of the M. & O. R. Co., because it is an instrument of interstate commerce in one place as well as another. . . . . We do not think that the levy of an attachment against a non-resident railroad company on one of its freight cars, standing idle and empty on the spur track of a railroad in this state is invalid, and a sale thereof can not be enjoined on the ground that such levy and sale are an interference with interstate commerce, or the duties of a common carrier to the public, or on the ground that a part of the property of a non-resident railroad corporation serving the public as a common carrier can not be sold under attachment to pay its debts."

This same question has been before the Supreme Court of

Kansas in *Missouri Pacific Ry. Co. vs. Kennett*, decided Dec. 12, 1908, and reported in 99 Pacific, 269.

The attack upon jurisdiction was based upon two contentions. 1st. That the car in controversy was being used in interstate commerce. 2nd. That in any event, seizure of the car would contravene public policy in that it would embarass commerce. While this case does not decide but that railway cars in actual use are not subject to attachment, it uses this significant language, peculiarly appropriate to the case at bar, in reference to the situation of the cars when attached, and the question of the interests of the public:

"The plaintiff in error," the railway company, "had the burden of proof, had all the facts in its possession, and could have shown the truth. Its conduct in doling out none but the remote circumstances, found in the evidence, leads us to the conclusion that a disclosure of all facts would have been prejudicial, and the finding of the Court is approved. This disposes of the main argument. *There is nothing in the record to show where the car in question came from, whether it was going anywhere, whether it was loaded, or empty, in short whether it was being used for railroad transportation purposes at all.*" (Italics are ours.) "Conceding, for the purposes of the decision merely, that the law upon the second proposition is correctly stated by the plaintiff in error, there are no facts to which it can apply. The court will not go very far upon mere assumption that the public welfare will be prostrated by this proceeding, and so drive the plaintiff to ask a receivership for a great railway company to collect this trifling debt."

The latest case upon this subject is the well considered case of *De Rochemont vs. N. Y. C. & H. R. R. R. Co.*, a New Hampshire case decided in January of this year and reported in 71, Atlantic, 868.

This is a case which in its facts and case history is identical

with the case at bar. It is seldom indeed that two cases present the same identical features.

In the New Hampshire case a car belonging to the N. Y. C. & H. R. R. R. Co. was attached in the possession of the Boston & Maine R. R. Co. The statement of facts in that case disclosed the same situtaion as is claimed by the defendant in error to exist in the instant case.

"The defendant does not own or operate a railroad in this state, and has no place of business here, but they have a contract with the Boston and Maine Railroad whereby each corporation sends its cars over the road of the other. Each pays the other for the use of a car so sent from the time of its receipt until its return and has a right to load it on the return journey provided it is routed toward the point at which it was reecived. The car in question was loaded in the state of New York for Greenland, N. H., was unloaded as soon as it arrived at Greenland, and was attached before the B. & M. R. Co. had time to return it to the defendants. The defendants appeared specially and moved to dismiss. 1st. Because of their contract with the B. & M. Railroad and 2nd, Because the car was being used in interstate commerce at the time of the attachment."

These are the identical questions urged and insisted upon by the defendant in error in the case at bar, and it is interesting and instructive to review the disposition which the New Hampshire court makes of them.

As to the first of these contentions its opinion is in entire harmony with the matter contained in our earlier brief, except that it is more emphatic and more to the point.

This Court will bear in mind that the several garnishees were not before the court on the hearing of the motion in the Court below, their answers having been controverted, and a triable issue joined thereon. So the New Hampshire Court says:

"The fact that the Boston and Maine Railroad is not a party

to this proceeding is an answer to the defendants first position. It will be time enough to consider whether that corporation had an interest in the car which the sheriff was bound to respect when it sues him for attaching the property."

This is exactly our position in the instant case. The defendant in error has attempted to urge the rights of the garnishees under the alleged contracts. Our claim is that it can not do so and that its attempt so to do under a so-called special appearance raises non-jurisdictional questions and renders its appearance general.

Upon the other branch of the case, that is, as to the question of interference with interstate commerce, the same points were urged as are presented in the case at bar. The decision fully covers all points involved in this case, upon this branch of the controversy. It is quite lengthy and we will content onrselves with brief quotations, but earnestly ask this Court's careful consideration of the entire case, for it seems to us to be in entire harmony with the expressions of this Court in "The Winnebago," 205 U. S., 354 and *Johnson vs. Pacific Elevator Co.*, 119 U. S., 388, heretofore cited.

In the course of its opinion the New Hampshire Court says, "The reasons the defendants urge for holding the attachments void are that it is forbidden, 1st, By the commerce clause of the Federal Constitution. 2nd, By Section 5258 of the Revised Statutes of the United States, and 3rd, By the interstate commerce act."

"(1) Is this attachment forbidden by the commerce clause of the Federal Constitution? Although the Supreme Court of the United States has not passed upon the precise point involved in this case, it has frequently considered the question of what constitutes an illegal interference with intestate commerce." (Citing a long list of cases from this Court, among which are "The Winnebago," 205 U. S., 354, and *Sherlock vs. Alling*, 93 U. S., 99,

heretofore cited by us in our brief.) . . . . . "And the argument in each case leads to the conclusion that if the thing itself is in pursuance of a valid state law, its enforcement will not be stayed because it may incidentally affect interstate commerce. . . . . The test, therefore, to determine whether the attachment in this case was forbidden by the commerce clause is to inquire, (1), whether the statute which authorized it is a valid state law; and if it is, (2) whether the attachment of the car was a direct interference with interstate commerce. That the statute under which the attachment was made is a valid state law, enacted to enable creditors to collect their debts, and for no other or ulterior purpose, is not questioned. Hence the attachment of the car was not forbidden by the commerce clause of the Federal Constitution; for it is obvious that seizing a car when it is not in use does not directly affect either interstate or intrastate commerce."

The opinion of the New Hampshire Court upon the other two questions, xiz. the effect of Section 5258, Revised Statutes of United States and the Interstate Commerce Act af 1887, is too lengthy to be set forth in this brief, it however covers the very points presented by the defendant in error in its contentions here, and we quote the syllabus of the opinion of the New Hampshire Court upon these points, and ask the considerate attention of the Court to the body of the opinion.

"Revised Statutes U. S., Section 5258, authorizing every railroad to carry on its road freight and property on their way from any state to another state and to connect with roads of other states so as to form a continuous line for the transportation of the same to the place of destination, gives railroads the right to engage in interstate business and to become jointly interested with roads in other states in interstate business originating on their lines, and a foreign railroad, contracting with a domestic railroad for the through shipment of cars stands on the same foot-

ing as the domestic railroad, and the statute does not forbid the attachment of the cars of a foreign railroad when in the state and not in actual use."

Citing in the opinion *Kenturky, etc. Co. vs. Railroad*, 37 Fed., 597, heretofore cited in our brief.

"The object of the Interstate Commerce Act forbidding railroads from giving preferences to persons or places, etc., is to compel railroads to carry for all on equal terms and for a fair price without unnecessary delay, and the act is not in conflict with a state statute permitting the attachment of freight cars when not in actual use."

It will be noticed in a perusal of some of the foregoing cases that some stress is laid upon the question of the burden of proof being upon the defendant in error to establish the fact of the immunity of the cars from seizure. In this respect the defendant in error has wholly failed to meet the requirements of the law. Its motion is entirely silent as to the condition of the cars when attached. The only averment being "all of which cars were so in the possession of the above said railway companies for the purpose of transporting freight and merchandise contained in said cars, etc. (Record, page 21.) And this averment does not cover the initial point of said cars, their destination or condition when attached, and is wholly insufficient, because made by one who fails to show that he has any knowledge or means of knowledge of the facts. The motion thus clearly falls under the ban as announced in the cases cited, and emphasized in *McLaren vs. Hall*, 26 Iowa, 300, where it is said, "The case should be made clear and satisfactory."

The Court below was left to the resistance of the plaintiff in error to ascertain the condition and status of the cars when attached, and in its opinion concedes that they were empty as averred. (Record, 26, 27, 38.)

IV.

The defendant in error still seems to insist that the garnishees were before the Court below and that the issues framed by their answers and the pleading of the plaintiff in error controverting the same were submitted to the Court.

The record discloses nothing of the kind, the judgment of the Court below recites:

"And now, to-wit, May 22nd, 1906, the *motion by defendant* to quash the attachment and discharge the garnishees thereunder, etc." (Record, page 39.) And again: "And now on this 6th day of June, A. D. 1906, this cause coming before the Court on *motion of the defendant* to quash," etc. (Record, page 40.)

The judgments show that the hearing was had upon the "motion of the defendant."

There could have been no hearing at that time of the issues joined between the garnishees and plaintiff in error, for we were entitled to a trial by jury of these issues as is provided by Section 3945 of the Code of Iowa, at page 8 of our original brief.

That the rights of the garnishees could not be considered in the motion made by defendant, is decisively held in cases cited at pages 18 and 19 of our original brief and in the late and decisive case of

De Rochemont vs. N. Y. C. & H. R. R. R. Co., 71 Atl., 868, and the attempt on its part so to do raised non-jurisdictional questions and converted its alleged special appearance into a general one.

This cause should be remanded to the Circuit Court for trial upon its merits.

Respectfully submitted,

ELBERT H. HUBBARD,
of Sioux City, Iowa,
WILBUR OWEN,
of Sioux City, Iowa,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 123.

CHARLES A. DAVIS, EXECUTOR OF THE ESTATE OF FRANK E. JANDT, DECEASED, PLAINTIFF IN ERROR,

vs.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, ET AL, DEFENDANTS IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

DEFENDANT'S STATEMENT OF THE CASE.

This cause was instituted in the District Court of Woodbury County, Iowa, to recover damages alleged to have been sustained by reason of the death of plaintiff's intestate, in the State of Illinois on account of the breaking in two of a freight train upon which the intestate was riding.

The defendant company is a railway common carrier incorporated under the laws of Ohio and Indiana, with its principal place of business at Cincinnati, Ohio. It does not own or operate

any lines of railway in the State of Iowa, and did not own or operate any lines of railway in the State of Iowa, and did no business in the State of Iowa and had no agent therein at the time of the commencement of the action. The only service of process ever made upon the defendant was the service of an original notice, or summons, and notice of attachment and garnishment, at its home office in Cincinnati, but jurisdiction over its property was attempted by the service of garnishment notices on various railway common carriers operating in Iowa, in whose possession certain cars alleged to belong to the defendant were found. The garnishees at the proper time all appeared in the proceedings in the state court, and each filed an answer stating that the cars of the defendant company so in possession of the garnishees came into their possession loaded with merchandise destined from one state to another, constituting what is known as interstate shipments, and by reason of contracts and agreements between the garnishees and the defendant requiring the immediate return of the cars, but permitting the garnishees to use the cars by reloading them for the return trip, and, as required under the state practice as to disclosure of any funds or indebtedness in the hands of the garnishees owned by or due to the principal defendant, each garnishee further stated under oath that there was no indebtedness due the principal defendant, and no other property or funds in their hands belonging to the defendant.

After the service of the original notice upon the defendant at Cincinnati, it appeared in the state court for the sole purpose of filing its petition and bond for removal into the federal court, on the ground of diversity of citizenship, and in the federal court filed a special appearance and motion to quash the service and discharge the attached property, supported by an affidavit showing that the cars in the possession of the garnishees went into their possession loaded with interstate shipments, and under agree-

ments permitting their use by the garnishee until they should be returned, as hereinbefore stated, and, further, that there was no indebtedness due it from any of the garnishees.

To this special appearance and motion the plaintiff filed what he termed a "resistance," supported by an affidavit of one of his attorneys, and upon the issues thus formed the case was submitted to the court, and on the 22nd day of May, 1906, the court found as a matter of fact that the cars were engaged in interstate commerce (pg. 31, printed Record) at the time of the garnishment, and that the contracts and agreements alleged for the use of the cars by the garnishees existed, as contended by the defendant, and sustained defendant's motion to quash the service and discharge the attached property, and thereafter on the 6th day of June, 1906, either upon its own motion, or at the instance of the plaintiff, the court made another order in the case dismissing the cause of action and entering judgment against the plaintiff for costs. The defendant never filed in the cause any pleading or paper, except the special appearance and motion heretofore referred to, notwithstanding plaintiff in error's constant reference in its brief, filed in this court, to the case having been dismissed on the 6th day of June, 1906, on defendant's motion.

The decision of the trial court herein referred to was made at term time at Sioux City, Iowa, during the May, 1906, term of the Circuit Court, and thereafter, and on or about the 28th day of September, 1906, the Judge of the Circuit Court sitting at Chambers in another division of the district granted an order allowing a writ of error from the Supreme Court of the United States, and on the 1st day of October, 1906, granted another order allowing a writ of error from the Circuit Court of Appeals for the 8th Circuit, which latter writ of error was prosecuted in the Circuit Court of Appeals, with the result that it was there dismissed on the 19th day of October, 1907, (see 156 Fed. R., p. 775.) On the 18th day

of March, 1908, without any further petition or assignment of errors therefor, the judge of the Circuit Court for the Northern District of Iowa, granted an order allowing a writ of error from the Supreme Court of the United States, upon which order the clerk made up the record, and it was filed in the Clerk's office of the Supreme Court sometime during the month of April, 1908.

The defendant in error has filed in this court its motion supported by brief to dismiss this writ of error on various grounds, subject to the rights of the defendant under that motion it now proceeds to answer the brief of plaintiff in error.

POINTS AND BRIEF.

I.

ON THE MOTION TO DISMISS FOR WANT OF JURISDICTION IN THIS COURT.

First we desire to add to the argument heretofore filed in this cause on the motion to dismiss, particularly in support of the 4th ground thereof, to-wit, that if any jurisdictional question is presented to this court by this appeal, it is not such a jurisdictional question as is contemplated by the Judiciary Act of 1891, providing for appeals, certified directly to this court.

The jurisdiction of the Court was not questioned over the parties to the suit, nor the subject matter of the suit, nor because it was a federal court. Merely the method of service was questioned, and that question applied equally to the state courts.

There is no question but what under the state practice, where the case was commenced, jurisdiction could have been obtained and sustained in the manner attempted, if the property attached was subject to service of attachment process. Our contention is that the property was not subject to attachment, because exempt under the Commerce Act of Congress. That presents the ques-

tion, not of the jurisdiction of the court, but as to whether the property is so exempt; such question could be determined by either the state or the federal court, and is not strictly a jurisdictional one, certainly not such as is contemplated by Sec. 5, of the Act of March, 3d, 1891, that should be certified directly to the Supreme Court.

It seems that this is not such a question as this court has decided in the Hammond Elevator case, nor in the Kendall case, 198 U. S., 477. It is not whether service may be made upon a certain person or in a certain manner; it is merely whether certain property may be reached by attachment process, and judgment rendered against that property. There never was any contention on the part of any one that the process conferred jurisdiction over the person of the defendant.

The constitutionality of the state laws has never been questioned in this case; merely its application to the property involved. There is no federal question raised in the case.

In *Trust Co. vs. Knott*, 191 U. S., p. 225, this court said:

"The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court, as a Federal Court, and in Bache vs. Hunt, 193 U. S., p. 523, this Court dismissed the appeal because it was said, 'The jurisdiction of the Circuit Court was only questioned in respect to its general authority as a judicial tribunal, and not in respect to its power as a court of the United States.' "

See further, *Courtney vs. Pradt*, 196 U. S., p. 89.

Smith vs. McKay, 161 U. S., p. 355.

The jurisdictional questions here involved could and should have been determined by the Circuit Court of Appeals.

See *Boston & Maine R. Co. vs. Gokey*, 210 U. S., p. 154, wherein this court uses the following language: "The defendant was not bound to waive the other questions in the case, and come di-

rectly to this court from the circuit court upon the sole question of jurisdiction of the character herein presented, the jurisdiction not resting upon the ground that the suit arose under the constitution, laws, or treaties of the United States, but it had the right to go to the circuit court of appeals and there argue the jurisdictional question of the character above mentioned, among the others, and it was the duty of the circuit court of appeals, to decide the whole case, and its decision of all questions appearing in this record would be final, on account of the jurisdiction of the circuit court resting on diversity of citizenship alone, unless this court should review it by a writ of certiorari. This principle was decided in *American Sugar Ref. Co. vs. New Orleans*, 181 U. S., 277, 282, 45 L. ed. 859, 862, 21 Sup. Ct. Rep. 646, and cases cited."

Also see cases of *K. C. N. W. R. Co. vs. Zimmerman*, 210 U. S., p. 334; *Bank of Memphis vs. City*, 189 U. S., 71; *McFadden vs. U. S.*, decided April 12, 1909.

It is an attempt to prosecute two appeals; which this court has repeatedly decided cannot be done.

Robinson vs. Caldwell, 165 U. S., 359.

Lock vs. Columbia, 129 U. S., 472.

II.

SERVICE OF PROCESS AND JURISDICTION WERE SOUGHT IN THIS CAUSE BY GARNISHMENT OF RAILWAY COMMON CARRIERS IN WHOSE POSSESSION CARS BELONGING TO THE DEFENDANT IN ERROR WERE FOUND IN THE STATE WHERE THE ACTION WAS COMMENCED, BUT FOREIGN TO THE RESIDENCE OF THE DEFENDANT, AND FOREIGN TO THE STATE WHERE THE CAUSE OF ACTION AROSE, AND FOREIGN TO ANY STATE WHERE THE DEFENDANT OWNED OR OPERATED ANY LINE OF RAILWAY, OR HAD ANY AGENT OR

AGENCY, OR DID ANY BUSINESS, AND WHERE THE CARS SOUGHT TO BE REACHED WERE IN THE POSSESSION OF THE GARNISHEES FOR THE PURPOSE OF ALLOWING AND COMPLETING THROUGH INTERSTATE SHIPMENTS, AND UNDER AGREEMENTS PERMITTING THE GARNISHEES TO USE THE CARS UNTIL RETURNED. TO PERMIT SERVICE TO BE OBTAINED IN THIS MANNER WOULD IMPEDE AND BURDEN INTERSTATE COMMERCE, AS INTENDED AND REQUIRED UNDER THE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND THE RAILWAY ACTS OF CONGRESS.

Section 1 of the Interstate Commerce Act provides among other things that, "The term 'transportation' shall include cars and other vehicles, and all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery, elevation, and transfer, in transit . . . . *and it shall be the duty of every carrier*, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor, *and to establish through routes.*" (Italics ours.)

Sect. 5258 of the Railway Act of Congress provides that "Every railroad company in the United States, whose road is operated by steam, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, mails, freight, and property, on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

"The purpose and policy of Congress has been constantly to protect and often to require the formation and operation of continuous lines of transportation. Almost without exception it has authorized, and generally has required the owners of railroad

bridges built under its authority to allow the use of their bridges and tracks for the passage of trains of connecting companies." (U. P. R. Co. vs. Chicago R. Co. (C. C. A.) 51 Fed. R., p. 309.)

"It is impossible to ignore the great public policy in favor of continuous lines thus declared by Congress, and it is in effectuation of this policy that such business arrangements as will make such connections effective, are made." (U. P. R. Co. vs. Chicago R. Co., 163 U. S. p. 564.)

2. THESE CARS WERE ENGAGED IN INTERSTATE COMMERCE AND UNDER CONTROL OF CONGRESS, NOTWITHSTANDING SOME OF THE CARS WERE EMPTY AND AWAITING THEIR RETURN TO THEIR OWNER IN COMPLETION OF AN INTERSTATE JOURNEY.

Johnson vs. S. P. Co., 196 U. S., p. 1.

Connery vs. Ry. Co., 92 Minn., p. 20; 99 N. W. R., p. 365.

Shore & Bros. vs. B. & O. R. R. Co., 76 S. C., p. 472; 57 S. E., p. 526.

3. THERE IS A DISTINCTION BETWEEN MERCHANDISE WHICH MAY OR MAY NOT BECOME ARTICLES OF INTERSTATE COMMERCE, AND CARS OR OTHER INSTRUMENTS WHICH ARE USED IN MOVING INTERSTATE COMMODITIES, WHICH MAY HAVE STOPPED TEMPORARILY ON THEIR JOURNEY.

Johnson vs. S. P. Co., 196 U. S., pp. 20 & 22 of opinion.

4. THE STATE LAWS CANNOT BE PERMITTED TO IMPEDE OR IMPAIR INTERSTATE TRAFFIC, OR THE USEFULNESS OF THE FACILITIES FOR SUCH TRAFFIC.

I. C. R. Co. vs. Ill., 164 U. S., p. 142.

Bowman vs. Chicago, 125 U. S., p. 465.

Ry. Co. vs. Richmond, 19 Wall. (U. S.) p. 584.

C. & N. W. Ry. Co. vs. Forest, 95 Wis., p. 80; 70 N. W. R., p. 77.

Commissioners vs. Tommey, 115 U. S., p. 122.
Tel. Co. vs. Tekas, 105 U. S., p. 460.
Tel. Co. vs. Pendleton, 132 U. S., p. 447.
R. R. Co. vs. Enbank, 184 U. S., p. 27.
Ball vs. U. S., 10 Wal. (U. S.) p. 557.
Hall vs. DeCuir, 95 U. S., p. 485.
4 Elliott on Railroads, 1st Ed., Sec. 1664.
Robbins vs. Shelby Co., 120 U. S., p. 489.
R. R. Co. vs. Pa., 136 U. S. p. 114.
Brown vs. Maryland, 12 Wheat (U. S.) p. 419.
McCulloch vs. Maryland, 4 Wheat. (U. S.) p. 316.
Pacific Coast Lumber Co. vs. W' R. R. Co., 165 Fedl. 1.
Leisy vs. Hardin, 135 U. S., p. 539.
Prigg vs. Pa., 16 Pet. (U. S.) p. 539.
Easton vs. Iowa, 188 U. S., p. 220.
Ry. Co. vs. Murphy, 196 U. S., p. 194.
Gibbons vs. Ogden, 9 Wheat (U. S.) p. 1.
Welton vs. Missouri, 91 U. S., p. 275.
C. & N. W. Ry. Co. vs. Fuller, 17 Wall (U. S.) p. 560.
S. C. vs. Georgia, 93 U. S., p. 4.
Kidd vs. Pearson, 128 U. S., p. 1.
McCall vs. Calif., 136 U. S., p. 104.
Kelley vs. Rhodes, 188 U. S., p. 1.
Texas & P. Ry. Co. vs. Abeline County Oil Co., 204 U. S., 246.
Gulf Ry. Co. vs. Helfey, 15 U. S., 98.

5. IT IS A DIRECT INTERFERENCE WITH, AND BURDEN UPON, INTERSTATE COMMERCE WITHIN THE INHIBITION OF THE ACTS OF CONGRESS CONTROLLING SUCH COMMERCE TO PERMIT THE ATTACHMENT OR GARNISHMENT OF CARS SO ENGAGED IN A FOREIGN JURISDICTION.

Michigan C. R. Co. vs. C. & M. L. S. R. Co., 1st Ill. App., p. 399.

Connery vs. R. Co., 92 Minn., p. 20; 99 N. W. R., p. 365.

Shore & Bro. vs. B. &. O. R. R. Co., 76 S. C., p. 472; 57 S. E., p. 526.

Siebels vs. Northern Cent. Ry. Co., (S. C.) 61 S. E., p. 435.

Wall vs. Ry. Co., 64 L. R. A., p. 501 (W. Va.)

Ry. Co., vs. Forrest, 95 Wis., p. 80, Supra.

6. THE METHOD OF SERVICE OF THE WRITS OF ATTACHMENT WAS IRREGULAR AND ILLEGAL, AND CONFERRED NO RIGHTS UPON THE PLAINTIFF. THE CARS SOUGHT TO BE REACHED WERE SUSCEPTIBLE OF MANUAL DELIVERY, AND TO CREATE ANY LIEN OR GIVE EFFECT TO THE PROCEEDINGS THE OFFICER MUST TAKE MANUAL CUSTODY OF THE PROPERTY.

Section 3898 of the Iowa Code is as follows:

"Property capable of manual delivery, and attached otherwise than by garnishment, is bound thereby from the time manual custody thereof is taken by the officer after the attachment."

Also, see *Shinn on Attach. & Garn.*, Vol. 1. p. 391, 1st Ed.

Culver vs. Rumsey, 6 Ill., App., p. 598.

R. R. Co. vs. Pennock, 51 Pa., St., p. 244.

Drake on Attachments, 7th Ed., Sect. 246.

Crawford vs. Newell, 23 Ia., p. 453.

Hibbard vs. Zenor, 75 Ia., p. 471.

Hall vs. Craney, 140 Mass., p. 131.

Boston R. R. Co. vs. Gilmore, 37 N. H., p. 410.

7. THE STATUTE OF IOWA PERMITTING ATTACHMENTS AND GARNISHMENTS, AND THE SALE OF PROPERTY THEREUNDER, IS NOT OF ITSELF BROAD ENOUGH TO AUTHORIZE THE ATTACHMENT AND SALE OF RAILWAY PROPERTY NECESSARY IN THE DISCHARGE OF ITS PUBLIC DUTIES.

UNDER THE COMMON LAW NO SUCH RIGHTS EXIST, AND WHERE THE RIGHT IS CLAIMED UNDER A STATUTE, THE STATUTE MUST BE SPECIFIC IN ITS PROVISIONS WITH REFERENCE TO THE ATTACHMENT, SEIZURE AND SALE OF RAILWAY PROPERTY.

Railway Co. vs. Forest, 95 Wis., p. 80, *supra.*

Commissioners vs. Tommey, 115 U. S., p. 122, wherein it is said, "Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm, or other property, for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company that may be essential in the operation and maintenance of its road for the public purposes for which it was established."

Se also, *Wall vs. Ry. Co.*, (W, Va.) 64 L. R. A., p. 506, *Supra.*

8. EVEN IF IT COULD BE SAID THAT ORDINARILY GARNISHMENT PROCEEDINGS WOULD CONFER RIGHTS AND CREATE A LIEN IN FAVOR OF THE PLAINTIFF AS TO THE CARS IN QUESTION, JURISDICTION OVER THE PROPERTY COULD NOT BE THUS OBTAINED IN THIS CASE, BECAUSE IT WAS SHOWN AND FOUND AS A MATTER OF FACT BY THE TRIAL COURT THAT CONTRACTS EXISTED BETWEEN THE DEFENDANT AND THE GARNISHEES WHEREBY THE GARNISHEES HAD THE SOLE RIGHT TO THE POSSESSION AND USE OF THE CARS UNTIL RETURNED TO THE DEFENDANT IN THE USUAL COURSE OF OPERATION. EACH AND EVERY GARNISHEE IN THIS CASE SET UP AND CLAIMED THIS RIGHT IN THEIR ANSWERS.

Drake on Attach. (3d Ed.), p. 462, lays down the following rule:

"It is an invariable rule that under no circumstances shall a garnishee by the operation of proceedings against him be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself."

The above rule is adopted and supported by the following cases:

Wall vs. Ry. Co., 52 W. Va., p. 485; 64 L. R. A., p. 501.

M. C. R. R. Co. vs. Ry. Co., 1st Ill. App., p. 399.

Connery vs. Ry. Co. (Minn.) 92 Minn., p. 20; 99 N. W. R., p. 365.

Johnson vs. U. P. R. Co., 145 Fed., 249.

Johnson vs. U. P. R. Co., 69 Atl., p. 288. (R. I.)

Siebels vs. Northern Cent. Ry. Co., 61 S. E. (S. C.), p. 435.

9. THE INTERSTATE COMMERCE ACT ENJOINING UPON RAILWAY COMMON CARRIERS THE DUTY OF PROVIDING AND ESTABLISHING THROUGH ROUTES, AND THE RAILWAY ACT OF CONGRESS AUTHORIZING AND EMPOWERING STEAM RAILROADS TO PROVIDE AND FURNISH CONNECTIONS AND THROUGH TRANSPORTATION, CREATE A DISTINCTION BETWEEN WATER CRAFT ENGAGED IN INTERSTATE COMMERCE AND RAILWAY COMPANIES SO ENGAGED AS TO THE RIGHT OF FOREIGN ATTACHMENT.

The St. Louis, 48 Fed., p. 312.

U. P. R. Co. vs. Chicago R. Co., 163 U. S., p. 564.

III.

GARNISHMENT OF THE FUNDS.

1. IT WAS NOT CONTENDED BY THE PLANITIFF IN ERROR THAT ANY OF THE GARNISHEES HAD IN THEIR POSSESSION OR UNDER THEIR CONTROL ANY PROPERTY OF THE DEFENDANT OTHER THAN THE CARS IN

QUESTION, OR THAT EITHER OF THE GARNISHEES WERE INDEBTED TO THE DEFENDANT IN ANY SUM OTHER THAN FOR ITS PROPORTIONATE SHARE OF THE COMPENSATION FOR THE CARRIAGE OF THE PROPERTY FROM THE POINT OF SHIPMENT TO ITS DESTINATION, WHICH THE GARNISHEES MAY HAVE COLLECTED AT SAID DESTINATION AS THE TERMINAL OR FINAL CARRIERS OF SUCH INTERSTATE SHIPMENT (Printed Record, p. 31.) AND ALL OF THE GARNISHEES ANSWERED UNDER OATH THAT THERE WAS NO INDEBTEDNESS OF ANY CHARACTER OR KIND OR UPON ANY ACCOUNT DUE THE DEFENDANT; THAT THEY HAD NO PROPERTY IN THEIR POSSESSION OR UNDER THEIR CONTROL BELONGING TO THE DEFENDANT EXCEPT THE CARS IN QUESTION. TO THESE ANSWERS THE PLAINTIFF FILED A PLEADING CONTROVERTING THE SAME (See printed record pp. 6-15, inclusive) AND UPON THE ISSUES THUS PRESENTED THE QUESTION WAS SUBMITTED TO THE COURT, AND THE ANSWERS OF THE GARNISHEES MUST BE ACCEPTED AS CONCLUSIVE.

Walters vs. Ins. Co., 1 Ia., p. 404.

2. THE ANSWERS OF THE GARNISHEES MUST DISCLOSE AN ABSOLUTE INDEBTEDNESS WITHOUT ANY CONTINGENCY BEFORE ANY LIEN IS CREATED OR JURISDICTION OBTAINED.

Fellows vs. Smith, 131 Mass., p. 363.

3. IF IT COULD BE URGED THAT THE RECORD DISCLOSES THAT THERE WERE, OR MIGHT HAVE BEEN, FUNDS IN THE HANDS OF THE GARNISHEES BELONGING TO THE DEFENDANT, OR DEBTS OWING TO THE DEFENDANT, IT IS CLEARLY SHOWN THAT SUCH FUNDS OR DEBT, IF ANY, WERE ONLY BY REASON OF

EARNINGS ON ACCOUNT OF INTERSTATE SHIPMENTS OF MERCHANDISE, AND TO ALLOW GARNISHMENT OF THE SAME WOULD BURDEN AND IMPEDE INTERSTATE COMMERCE TO THE SAME EFFECT AS THE ACTUAL SEIZURE AND ATTACHMENT OF THE CARRIER'S CARS.

4. AGAIN, SUCH FUNDS OR INDEBTEDNESS COULD NOT BE REACHED BY GARNISHMENT PROCESS IN A FOREIGN JURISDICTION, BECAUSE THE RECORD CLEARLY DISCLOSES THAT THE CONTRACTS THEREFOR WERE ENTERED INTO IN A STATE OTHER THAN THAT IN WHICH THE ACTION WAS COMMENCED, AND THE PAYMENTS THEREOF WERE TO HAVE BEEN IN SUCH FOREIGN STATE. THEREFORE, THERE WAS AN ACTUAL SITUS OF THE DEBT, WHICH SITUS WAS FOREIGN TO THE JURISDICTION OF THE COURT ENTERTAINING THE ACTION, AND FOR THE FURTHER REASON THERE WAS NO PERSONAL SERVICE IN THE STATE WHERE THE ACTION WAS INSTITUTED.

See *Drake on Attach.*, 3d Ed., Sec. 474.

Shinn on Attach., 2nd Ed., Secs. 490, 491 and 494.

In the case of Railroad Co. vs. Maggard, 39 Pac., 985, the court said:

"Situs of a debt is where the contract is to be performed, and, therefore, when the defendant and the garnishee are both non-residents, there is no property within the state which can be attached so as to give the court jurisdiction."

See, also, *Central Trust Co., vs. Ry. Co.*, 68 Fed. R., p. 685.

Aye vs. Lidscomb, 21 Pick, p. 263.

Gold vs. Ry. Co., 1st Gray, p. 424.

Singer vs. Fleming, 39 Neb., pp. 679-686.

Drake vs. Ry. Co., 89 Mich., p. 168.

Ry. Co. vs. Smith (Miss.) 19 L. R. A., p. 597.

McSham vs. Knox (Minn.) 114 N. W. R., p. 955.

AS TO THE RIGHT OF GARNISHMENT THERE IS A DISTINCTION CLEARLY DRAWN BETWEEN ACCOUNTS PAYABLE ANYWHERE AND THOSE PAYABLE IN A PLACE CERTAIN BY CONTRACT.

See *Strum vs. C. R. & P. Ry. Co.*, 174 U. S., p. 710.

Harris vs. Balk, 198 U. S., p. 1023.

IV.

THE SPECIAL APPEARANCE.

Plaintiff in Error's principal contention is that defendant in error conferred jurisdiction over its person by the form of its special appearance in the trial court in that it called into power some action of the trial court inimical to the limited purposes of a proper special appearance, particularly in that it required the court to pass upon a question of fact to determine the point raised.

The formal part of defendant's motion was as follows:

"NOW COMES THE DEFENDANT, CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND APPEARING SPECIALLY FOR THE PURPOSE OF THIS MOTION, ONLY, OBJECTS TO THE JURISDICTION OF THE COURT OVER THE DEFENDANT, AND ALSO OF ITS PROPERTY AND GOODS, AND MOVES TO QUASH AND SET ASIDE THE SERVICE OF ATTACHMENT AND GARNISHMENT ATTEMPTED TO BE MADE IN THIS CAUSE BY PLAINTIFF AGAINST THE DEFENDANT'S PROPERTY, AND AS GROUND THEREFOR STATES."

Then follows the grounds as shown by the motion set out on pages 20-24 inclusive, printed record.

THE RIGHT OF THE DEFENDANT TO INSIST UPON THE OBJECTION TO THE ILLEGALITY OF THE SERVICE WAS NOT WAIVED BY THE SPECIAL APPEARANCE OF COUNSEL TO MOVE THE QUASHING OF THE SERVICE AND THE DISCHARGE OF THE ATTACHED PROPERTY.

Harkness vs. Hyde, 98 U. S., 476-479.

Ry. Co. vs. Denton, 146 U. S., 208-210.

Wabash R. R. Co. vs. Brown, 164 U. S., p. 271.

Goldey vs. Morning News Co., 156 U. S., pp. 518-523.

Clark vs. Wells, 203 U. S., p. 163.

Fitzgerald vs. Fitzgerald, 137 U. S., p. 612.

Cady vs. Asso. Colonies, 119 Fed., p. 420.

SPECIAL APPEARANCES ARE EVEN ALLOWABLE UNDER THE STATE PRACTICE OF IOWA WHERE THE OBJECTION IS THAT SERVICE WAS UNAUTHORIZED.

Wilson vs. Stripe, 4 G. G. R., Ia., p. 551.

Hastings vs. Phoenix, 79 Ia., p. 394.

Crox vs. Allen, 91 Ia., p. 462.

Chittenden vs. Hobbs, 9 Ia., p. 417.

Murray vs. Wilcox, 122 Ia., p. 188.

Cibula vs. Pitts Co., 48 Ia., p. 528.

THE CONFORMITY OF FEDERAL PROCEDURE TO STATE PROCEDURE IN SUITS AT COMMON LAW, REQUIRED BY THE ACT OF CONGRESS, IS TO BE "AS NEAR AS MAY BE," AND NOT AS NEAR AS MAY BE POSSIBLE OR AS NEAR AS MAY BE PRACTICABLE; AND IT HAS BEEN JUDICIALLY DETERMINED THAT "THIS INDEFINITENESS" IN THE LANGUAGE OF THE ACT DID NOT RESULT FROM INADVERTENCE BUT WAS THE RESULT OF A LEGISLATIVE PURPOSE, AND THAT IT WAS THE INTENTION OF CONGRESS TO VEST IN THE JUDGES OF THE UNITED STATES A DISCRETION IN APPLYING THE LAW, AND TO GIVE THEM THE POWER TO REJECT ANY SUBORDINATE PROVISION OF STATE PROCEDURE WHICH, IN THEIR JUDGMENT, WOULD UNWISELY ENCUMBER THE ADMINISTRATION OF THE LAW, OR TEND TO DEFEAT THE ENDS OF JUSTICE, IN THEIR

TRIBUNALS, AND THAT THEY ARE EXPECTED TO REJECT SUCH PROVISIONS; AND THAT, WHILE THE ACT OF CONGRESS IS, TO A LARGE EXTENT MANDATORY, IT IS ALSO TO SOME EXTENT ONLY DIRECTORY AND ADVISORY.

Nudd vs. Burrows, 91 U. S. 426-442 (23:286.)

Indiannapolis & St. Louis Railroad Co. vs. Horst, 93 U. S., 291-301 (23:898.)

Phelps vs. Oaks, 117 U. S., 236-241 (29:888.)

O'Connell vs. Reed, 5 C. C. A., 586.

IT IS A FIRMLY ESTABLISHED PRINCIPLE OF JURISPRUDENCE, THAT A COURT OF JUSTICE CANNOT ACQUIRE JURISDICTION OVER THE PERSON OF A DEFENDANT, EXCEPT BY ACTUAL SERVICE OF NOTICE WITHIN THE JURISDICTION OF THE COURT UPON HIM, OR UPON SOME ONE AUTHORIZED TO ACCEPT SERVICE IN HIS BEHALF, OR BY HIS WAIVER, BY GENERAL APPEARANCE, OR OTHERWISE, OF THE WANT OF DUE SERVICE. THE RULE APPLIES TO CORPORATIONS AS WELL AS TO NTAURAL PERSONS; AND THE FEDERAL COURTS WILL NOT RECOGNIZE AS VALID SERVICE OF PROCESS, IN A PERSONAL ACTION AGAINST A CORPORATION, WHICH IS NEITHER INCORPORATED NOR DOING BUSINESS WITHIN THE STATE, NOR HAS AN AGENT THERE, BY SERVICE UPON ITS PRESIDENT WHILE TEMPORARILY IN THE STATE, ALTHOUGH SUCH SERVICE BE AUTHORIZED BY THE STATE LAW. AND A STATE STATUTE WHICH GIVES TO A SPECIAL APPEARANCE, MADE TO CHALLENGE THE COURT'S JURISDICTION, THE FORCE AND EFFECT OF A GENERAL APPEARANCE, SO AS TO CONFER JURISDICTION OVER THE PERSON OF THE DEFENDANT, IS NOT BIND-

ING UPON THE FEDERAL COURTS, AND WILL NOT BE CONFORMED TO BY THEM.

Bates Federal Procedure (1908) Sec. 934.

Galveston, Harrisburg & San Antonio R. Co. vs. Gonzales, 151 U. S., 496-520 (38:248.)

Southern Pacific Co. vs. Denton, 146 U. S., 202, (36:942.)

Mexican Cent. R. Co. vs. Pinkney, 149 U. S., 194 (37:699.)

Pennoyer vs. Neff, 96 U. S., p. 714.

ARGUMENT ON THE BRIEF.

It would seem that the Railway Act. Supra, imposes a positive duty upon railway common carriers to provide and allow through interstate shipments by permitting their cars loaded with merchandise destined to foreign states to go into such states over the lines of other roads. It is said that this Act is permissible, only, and imposes no duty upon the carriers. If this is true, why was the provision put into the Act? There was no necessity for it to enable carriers to arrange by contract or agreement for such service; it is certainly a logical conclusion that when Congress made such a provision it intended and meant that railway common carriers should use their facilities to the end that interstate shipments should not be interrupted by constant changing of cars, and that there should be no interference with them. It cannot be said that Congress made such provision to prevent the states from interfering with continuous routes, or continuous use of cars from one point to another, because there is no reason why any state should attempt to pass such a law. In fact, many of the states, including Iowa, have laws requiring railway companies to establish joint through rates and transfer through carload shipments to their destination without unloading. In addition to this provision of the Railway Act we find such expressions in

Sec. 1 of the Interstate Commerce Act as seem clearly to impose this as *a duty* upon railway common carriers, and such evidently was the thought of this court when it gave utterance to the expressions found in *U. P. R. R. Co. vs. Chicago R. Co.*, 163 U. S., p. 564;—"It is impossible to ignore the great public policy in favor of continuous lines thus declared by Congress, and it is in effectuation of this policy that such business arrangements as will make such connections effective, are made," and again, in *Bowman vs. Ry. Co.*, 125 U. S., 465, where this Court said in construing Sec. 5258 of the Railway Act, "This power in the national government is exclusive of all power in the state, and is destined to remove trammels upon transportation between different states which had previously existed, and to prevent a creation of such trammels in the future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; to reach trammels interposed by state enactments . . . . So far as these regulations made by Congress extend they are certainly indications of its intention that the transportation of commodities between the states shall be free except where it is positively restricted by Congress itself."

What can the following language employed in the Interstate Commerce Act mean if it does not impose the duty upon the carrier to furnish its facilities to complete interstate shipments, and a duty that can be coerced by mandamus:—"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or device, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from

the place of shipment to the place of destination unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

And see case of *Richmond Ry. Co. vs. Patterson*, 169 U. S., p. 311, wherein it is said, "It is, of course, elementary that where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it."

Clearly if the statutes quoted impose a duty upon the carrier in this respect, then it is the duty of the courts to prevent any interference with the performance of that duty, and to protect the carrier in the control of its facilities necessarily used. Public policy requires the free and uninterrupted use of cars in the exchange of interstate traffic, and the public welfare is certainly seriously injured if cars loaded with merchandise bound from one state to another can be seized under the various state laws at the instance of any person who imagines he has a claim or grievance against the owner of such cars, no matter where his home may be. Perishable goods may be ruined, and commerce seriously interrupted and interfered with, and if this be true of loaded cars, how is the distinction to be drawn between cars that may be empty at the time of the seizure, but on their way in the completion of their interstate journey, and cars empty or partially empty? In the instant case there is no showing as to what proportion of the cars sought to be attached were empty, and what proportion were loaded with merchandise. All were, however, engaged in interstate commerce within the meaning of the term, as interpreted by all the courts.

It is not claimed that the state has passed any laws directly contrary to the Acts of Congress, but it is claimed on behalf of the

defendant that to permit the instrumentalities used in the exchange of interstate traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the Acts of Congress. On principle it must appear that all cases cited (*supra.*) Point 4, Div. II, of Brief, supports this contention.

On this question plaintiff in error relies upon the cases of *Iroquois Transportation Co. vs. DeLaney*, 205 U. S., p. 354, and *Johnson vs. Chic. C. & P. Ele. Co.*, 119 U. S., p. 388. In each of these cases the property attached was a boat engaged in lake traffic. In the first of the cases the boat was seized under a state statute specifically allowing its seizure and sale for the claim which was the basis of the proceedings, and jurisdiction was especially conferred on the court by the statute in just such proceedings, and the same is practically true in every respect as to the second case, and the opinion in each case in stating that it was not an interference with interstate commerce to attach the boats, had no reference to the Interstate Commerce Act, nor to the Railway Act herein referred to, nor does either of those acts affect, or in any wise control, the boats or property attached in those cases. So that the bare expression in those opinions that the attachment was not an interference with interstate commerce is not authority in this case. To hold otherwise would be absolutely destructive to one of the very important purposes of the Interstate Commerce Act, because if a railway common carrier is to be subjected to litigation in any state of the union, no matter how distant from its home, and be compelled to go there and protect its rights by reason of allowing its rolling stock to leave its own tracks, then certainly railway common carriers will be compelled to put a stop to that practice, and the business and wellfare of the public will suffer the inconvenience and delay incident to a transfer of

interstate merchandise from the cars of each carrier as it reaches the end of its line.

In the case of *Connery vs. Ry. Co.*, 92 Minn., p. 20; 99 N. W. R., p. 365, this question was squarely before the court and fully and fairly determined, and from that opinion we quote as follows: "These well known provisions of law are expressive of a universal condition that exists upon all the railway lines of this country, and without giving them effect and permitting the railway carriers from other states to come into our boundaries with goods which are shipped here, and return without being retarded, or so treated that the carriers must protect themselves against litigation away from home, that they would transfer the contents of such cars to others in our state would be provocative of the greatest detriment to the business interests of our citizens, and be violative of the terms and spirit of the enactments to which we have referred. It follows that we cannot justify a construction of our attachment or garnishee statutes that would effectuate such a result, and, while it was a part of the contract between the nonresident corporation in this state and the connecting carriers that the freight cars should be reloaded, and within reasonable time returned, this custom was but a practical method of securing compensation for bringing the car into and out of the state in the necessary effort for continuous and unbroken transit, which is essential to the purposes of traffic and interstate commerce; hence it should not be treated as property subject to attachment. This subject has been thoroughly and exhaustively considered in two recent cases, and the reasoning therein within the lines above suggested meets our approval." *M. C. R. R. Co. vs. C. & M. L. S. R. R. Co.*, 1 Ill., App. 399-404; *Wall vs. Norfolk & Western Ry. Co.* (W. Va.) 44 S. E., 294. Had the car seized in this case been delayed longer than was necessary in the course of business to return it to the place from whence it came or had it been diverted

within the state to uses and purposes exceptional to its presence here under the demands of interstate commerce with the consent of the owing corporation a different proposition would be presented; but practically it was engaged in transit into and from the state upon such reasonable conditions as ought not to impose upon it such property conditions and characteristics as should subject it to seizure in coming into and returning from the state for the purposes of giving jurisdiction to litigants here who otherwise would be compelled to contest their causes of action in the tribunals where the property had its undoubted legal situs."

2. The right of attachment is entirely by statutory enactment, and the statute must be followed literally. A general statute, such as Iowa has, upon the question of attachment is not broad enough nor specific enough to permit of the seizure and sale of railway property necessary and used in the performance of its public duties, so that aside from the question of its interference with interstate commerce the plaintiff had no right under the Iowa statute to seize and sequester the cars of the defendant company. (See *Commissioners vs. Tommey*, 115 U. S., p. 122, *supra*, and *Ry. Co. vs. Forest*, 70 N. W. R., p. 77, *supra*.

3. Plaintiff acquired no lien upon the cars in question by the method of his service, because railway cars are susceptible of manual delivery, and are not the subject of garnishment, and to create a valid lien upon tangible property by attachment the officer must take actual custody of the property. The record discloses in this case that no attempt was made by the officers to take the property, or change its possession in any way. A mere service of the writ of attachment upon the owner and the party in possession, as was done in this case, confers no right whatsoever. (See authorities quoted under Point 6, Div. II of Brief.)

4. The garnishee had a contract right to the use of these cars, which contract right could not be interrupted by garnish-

ment or attachment proceedings. The garnishee claimed this right in their answers, and that question is still pertinent in this appeal, and the defendant has equal right to assert it. The rights of the parties and the law upon this question are stated perfectly in the rule laid down in *Drake on Attach., supra*, under Point 8 of the brief, and as laid down in the case of *North Chic. Rolling Mill Co., vs. St. Louis Co.*, 152 U. S., p. 619, where this court says: "The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor." "The service of garnishment neither changed nor interrupted the contractual relations existing between the Chicago Co. and the St. Louis Co. The rights and equities existing and to arise out of those contractual relations were in no way terminated or defeated by that service."

See also, *Waldron vs. Wilcox*, 13 R. I., 518-520.

Brown vs. Collins, 18 R. I., p. 242.

The defendant contends that in the state of the record in this case the rights of the garnishees and the obligation of the principal defendant to the garnishees with reference to the cars sought to be reached by garnishment or attachment, absolutely precludes the plaintiff from any right of attachment of those cars, and this question is as available to the defendant as to the garnishees, because the defendant is in duty bound to protect its contracts.

II.

1. It is contended by the plaintiff in error that he was entitled to a trial or hearing upon the issue presented by the answers of the garnishees, and his pleadings controverting those answers. The record discloses that the plaintiff elected to submit this question upon the pleadings hereinbefore referred to. No proof was offered to contravert the answers of the garnishees, and, there-

fore, their answers that there was no indebtedness whatever must be taken as conclusive, and if the trial court had jurisdiction to determine this question, its finding that there was no indebtedness is conclusive. It has equal force with the finding of a jury.

See *Ry. Co. vs. Cutter*, 147 Fed. R., p. 57.

Bowden vs. Burnham, 59 Fed. R., p. 752.

It was not claimed by the plaintiff that if there was any accounts due, or any indebtedness of any character existing, in faxor of the principal defendant, it was for anything, or on any account, except what might have grown out of the earnings of the defendant as its proportion of the interstate haul. Then we contend such accounts are not subject to garnishment or attachment in a foreign jurisdiction, because they were, as shown by the record, positively payable by contract at a place certain beyond the jurisdiction of the court issuing the attachment process; therefor, having an actual situs. (See authorities cited under Point 3 of Div.III of the brief.) And further because there was no personal service in the state. No jurisdiction can be obtained by garnishment proceedings without personal service.

McShane vs. Knox, 114 N. W. R., 955 *Supra.*

2. To permit garnishment or attachment of such funds would be as much of an interference with interstate commerce as the attachment of the cars and other instrumentalities used by the carriers. The earnings of the carrier on interstate shipments are as much subject to the Interstate Commerce Act as the rolling stock of the carrier, and are made so by specific reference thereto. To subject the earnings of the carrier on interstate shipments to attachments would occasion the carrier as great inconvenience and expense as would the attachment of its cars. The carrier is equally entitled to protection by the courts of its funds and earnings as it is of its cars. As an illustration:—Suppose a railway company delivers a car to a connecting carrier for the purpose of com-

pleting an interstate shipment from the Atlantic to the Pacific coast, and the initial carrier operates but a line of road located in the State of Massachusetts. As the car passes through the various states the initial carrier would be subject to the jurisdiction of every state through which the connecting lines operated, and might be compelled to defend its rights as to one account in every state in the Union.—This being true, should Congress and public policy compel the initial carrier to deliver its cars to connecting carriers, and thus subject itself to the burden and annoyance of endless litigation? It is shown by the affidavits attached to the special appearance of the defendant, and it appears by the answers of the garnishees, all as disclosed by the record in this case, that it is extremely difficult for the railway companies to determine at any given date the exact indebtedness existing between the various companies on account of exchange of cars, or to determine with any degree of certainty that any actual indebtedness exists, and to be compelled at the instance of any garnishee or attaching creditor in any court in the Union to make answers to this on any particular day would impose a very large expense, and would certainly be thereby a direct burden upon interstate commerce. Upon this point we especially direct the Court's attention to the case of *Central of Georgia Ry. vs. Murphey*, 196 U. S., 194.

Further, the revenue derived from the use of the cars is but an incident to the principal thing, namely, the cars carrying interstate commerce, and if the principal things, the cars, are exempt from attachment or garnishment, the incident, the revenue, is exempt.

In rendering the original opinion in this case Judge Reed, of the Northern District of Iowa, said:

"The defendant's share of the compensation for the carriage of the freight in question is as much a part of interstate commerce within the meaning of the acts of Congress regulating commerce

and as defined by the Supreme Court, as the actual carriage of the property. If a debt due to a non-resident carrier for such transportation upon its own line, when collected by the terminal or final carrier may be then attached in any state where the cars may go to complete an interstate shipment of property, then the owner of such cars will be compelled to follow them into such state, to there litigate with whomever may be authorized to attach such debt. If this is permissable, owners of such cars could not safely permit them to go beyond their own lines, nor could connecting carriers receive them or collect the cost of the entire shipment, without being drawn into litigation in which they have no interest, and be subject to much inconvenience and expense because thereof. The effect of such proceedings upon interstate transportation is apparent."

146 ~~156~~ Fed. Rep., ~~770~~. 402.

The logic of this statement seems to us irresistible. This court held in the case of *Philadelphia S. S. Co. vs. Pennsylvania*, 122 U. S., 326, that a state could not tax the gross receipts of a transportation company which had accrued from interstate commerce, on the ground that it was an interference with interstate commerce. The authority of this case was seriously impugned in *Maine vs. Grand Trunk Ry. Co.*, 142 U. S., 217, but in the recent case of *Galveston Ry. Co. vs. Texas*, 210 U. S., 217, this court returned to the doctrine enunciated in the Philadelphia S. S. Co., case, supra, and that case is re-affirmed to its full extent even by those Justices who dissented from the opinion in the Texas case.

It, therefore, may be laid down as the law of the land that money accruing from interstate transactions cannot be levied upon by a state in the exercise of its taxing powers. It is now clearly and emphatically the law that money received from interstate commerce cannot be taken by a state in the exercise of its taxing power, and, *a fortiori*, it is clear that the state cannot

authorize one of its citizens to attach and to appropriate these same earnings from interstate commerce. Attachment of such earnings is much more an interference with interstate commerce than the appropriation by taxation of any portion of the gross receipts of a railroad engaged in interstate commerce. Although it may be hard to see wherein taxation of gross receipts would in any way hamper or interfere with interstate commerce, it is clear from a brief consideration of railroad methods that the appropriae tion of traffic balances would be a serious menace to commerce between the states. No person likes to be brought into litigation in a Court outside the state of his domicil. It is a serious thing for a man living in California to be sued in Florida or Maine. It not only puts him to great expense because of the necessity of hiring counsel, but the travel of himself and witnesses and his absence from home is a serious detriment to him. The same is true in the case of the railroad, which is put to great expense and annoyance by being sued outside of the states within which it operates. If this method of obtaining jurisdiction is allowed, it is clear that the inevitable tendency will be for foreign railroads to refuse to allow freight to be transported out of the states within which they operate without the pre-payment of charges, and, furthermore, will not authorize the initial road to collect freight in advance, as, in the same way, balances would accrue in the hands of the foreign railroad. This would seriously interfere with the present method of conducting business, and would be a direct menace and interference with interstate commerce between the states. Furthermore, it would interfere with the establishment of through routes, in so far as the Interstate Commerce Act would permit this. It is hard to conceive of a situation which would be a greater direct menace to interstate commerce than these methods which railroads would be obliged to follow, in order to protect themselves from litigation in foreign states.

It is submitted, therefore, that the holding by attachment of money in the hands of a railroad is infinitely more an interference with interstate commerce than the taxation of gross receipts, which the Supreme Court has held definitely and finally to be an interference with such commerce.

Another distinct ground upon which to rest the unconstitutionality of a state statute authorizing the attachment of money accruing from interstate commerce is the nature of the trustee or garnishee process, as embodied in the statutes of most of the states. The statute of Massachusetts is undoubtedly more or less typical of most of the legislation upon this point. In order to attach money or property by trustee process, it is necessary that the money or property be due to the defendant "absolutely and without contingency," Revised Laws, Chap. 187, Sec. 23. The case of *Fellows vs. Smith* and *Northampton Street Railway Company, Trustee*, 131 Mass., 363, is as follows. The entire opinion is cited:

"Morton, J. This is a trustee process. The Northampton Street Railway Company was summoned as trustee. It appears by the trustee's answer that the principal defendant is in the service of the trustee as a conductor; that at the time of the service of the writ the wages earned by him amounted to $6.57; that he owed the trustee $4.75 for money received by him from the sale of tickets; and that he had in his possession tickets to the value of five dollars entrusted to him to sell. By the contract between the parties, the conductor was to account for the tickets entrusted to him in the settlement for his wages. By this contract, if he sued the trustee for his wages, he would be required to account for the tickets, either by returning them or by allowing their value in reduction or part payment of his claim for wages. At the time of the service of the writ the trustee did not owe the conductor any money "due absolutely and without any contingency."

Whether it owed anything depended upon the contingency or condition that the conductor should return the tickets in his hands. To charge it as trustee would place it in a worse position than it would be in if sued by the conductor, because it would then be compelled to pay the wages of the conductor without the performance of the condition upon which alone it is liable. Gen. Sts. c 142, Secs. 24-26. Upon these grounds, without discussing others, we are of opinion that the trustee was properly discharged by the Superior Court. Judgment affirmed."

It is clear, therefore, that the mere fact that a railroad, for bookkeeping purposes, shows a balance due to the defendant railroad at a particular time does not necessarily mean that anything is due absolutely and without contingency. In the above case, the railroad was willing to settle its wage account with its conductor, without regard to the fact that the conductor had property of the railroad for which he had eventually to account.

The same situation exists, only to a greater degree, in the case of mutual accounts between railroads. The whole significance of this can only be realized by a brief statement of the mutual debits and credits. In the first place, the foreign railroad sells tickets over the domestic railroad. The entire price of the ticket is collected at any one of perhaps a thousand stations. In due course, these sales are reported to the auditing office of the foreign railroad, and then, after the lapse of weeks, reported to the auditing office of the domestic railroad. The same thing takes place on the domestic railroad. Its agents sell tickets over the foreign railroad, and the same system of accounting and the same delays go on. In the case of freight, the foreign railroad may collect in advance the entire freight, or the domestic railroad upon delivery may make the entire collection; and vice versa in the case of shipments originating on the domestic rail-

road. These collections may also be made at any one of a thousand points.

Furthermore, a railroad pays to a foreign railroad a certain sum per day for the use of the cars of the foreign railroad while in its possession. This gives rise to mutual accounts, items of which accrue at any one of the many stations. The same is true of repairs on foreign cars, which, under a well recognized system, are made by the domestic railroad, and charged up to the foreign railroad. Furthermore, and of greater importance, is the fact that at any time cars of the domestic railroad are likely to be on the foreign railroad, and these have to be accounted for, so that, even if it were possible to arrive at the balance of money due, such balance might be offset by reason of the cars belonging to the trustee railroad held by the defendant railroad.

The point of this statement of methods is this—in order to ascertain whether, at the time of the service of the trustee writ, there was anything due absolutely and without contingency to the defendant railroad, it would be necessary to enter into an investigation, which it would probably be impossible to make, if the accurate amount were to be ascertained. But, even if possible to ascertain, it would impose such a burden upon interstate commerce as to make a statute authorizing it repugnant to the Federal Constitution.

In the case of *Central Railroad Company of New Jersey vs. Murphy*, 196 U. S., 194, the constitutionality of a state statute compelling a railroad, in case claim was made for loss of freight, either to recognize the claim or to ascertain where the loss took place was held to be unconstitutional, Mr. Justice Peckham said:

"We think the imposition upon the initial or any connecting carrier, or the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the

parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the Commerce Clause of the Federal Constitution." . . . . . .

"This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce. It is said that the reason for the passage of such an act lies in the fact that, as a general rule, shippers under such a contract as the one in question are very much inconvenienced in obtaining evidence of the loss or damage, where it occurred on another railroad than that of the initial carrier. It is contended that under such contract, there being great difficulty in identifying the particular carrier upon whose road the loss occurred, it is reasonable to make the initial or other connection carrier liable therefor, unless such carrier furnish the information provided for in this statute." . . . . .

"Assuming the fact that the carrier might more readily obtain the information than the shipper, we do not think it is material upon the question under consideration. We are not, however, at all clear in regard to the facts. The loss or damage might occur on the line of a connecting carrier, outside the state where the shipment was made, (as was the case here) and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company, receiving the freight from the shipper, has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper

information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce."

Courts should and do take into consideration the consequences of their decisions. A decision in this case permitting traffic balances such as are sought to be reached herein to be garnished would lead to far-reaching, grave, and serious consequences. Anticipating such burdens upon the business, carriers would be compelled to devise some means to protect themselves, and would either require freight to be paid in advance from each connecting carrier, which would be impracticable, or would raise the rates to a sufficient amount to cover the added burden and responsibility; and such a consideration or basis for increased rates must be held to be reasonable and permissible. This would clearly burden and impose upon interstate commerce impediments that Congress intended should not be imposed by reason of any state law.

In this connection it seems to us pertinent to quote from the language of Justice Taney, occurring on page 546 of the opinion in the *Charles River Bridge vs. Warren Bridge*, 11th Peters: "No one will question that the interests of the great body of the people of the state would in this instance be affected by the surrender of this great line of travel to a single corporation, . . . while the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation," and again on page 551, same opinion, "And what would be the fruits of this doctrine of implied contracts on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us?"

The defendant company owned and operated lines of railroad and had offices and agents in the States of Ohio, Indiana, Illinois, Michigan and Missouri. Both the State and Federal courts in those states were open to intestate's representative. Yet, instead of going into one of the states mentioned to bring his action where jurisdiction could have been obtained in the ordinary manner, he voluntarily brings his action in a foreign state and chooses a method of attempting to obtain jurisdiction already condemned and denied by many courts of last resort. Certainly no hardship was imposed upon plaintiff in requiring him to merely go into the adjoining state of Illinois, where his cause of action arose, to bring his action.

III.

Plaintiff's principal contention seems to be that the defendant has subjected its person to the jurisdiction of the court by the form of its special appearance, and insists that because a special appearance would not be permitted under the state practice to raise such a question, the federal courts are bound thereby. This question has been quite fully presented in the brief, and has been settled so frequently and emphatically by this court that it seems unnecessary to devote here any extended space to it. This court has determined the question in *Wabash vs. R. R. Co vs. Brow*, 164 U. S., p. 271.

Goldey vs. Morning News Co., 156 U. S., pp. 518-523.

Clark vs. Wells, 203 U. S., p. 163.

Ry. Co. vs. Denton, 146 U. S., pp. 208-210,

and in many other cases.

Our understanding is that the rule laid down by this court in *Hartness vs. Hyde, supra*, as follows, is still the controlling rule, to-wit: " . . . . Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance

of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer." In the above case the defendant evidently by inadvertence went beyond the ordinary purposes of a special appearance, and really asked for a dismissal of the case, and yet this court said that it was evidently the purpose of the defendant only to ask that the service be set aside. It should not be considered as a waiver of the illegal service. Plaintiff also contends that because the defendant supported its special appearance and motion by an affidavit setting up matters *dehors* the record, it thereby subjected itself to the jurisdiction of the court. This position is untenable. The facts set out in plaintiff's special appearance were pertinent only to the questions there raised, and were necessary for the court to determine just as it would be necessary for the court to determine the facts with reference to the special appearance of a corporation whose secretary or other officer had been served with process in a foreign jurisdiction in an action against such corporation where such officer may have been on private business of his own. Jurisdiction of the corporation could not be obtained by such service, but the corporation's special appearance to defeat the service would necessarily have to be supported in some form *dehors* the record. It would be absurd to urge that the corporation would defeat the very and only purpose of its appearance by setting up and showing the facts, or that it would thereby be in court for all purposes. An examination of the defendant's special appearance and motion will determine that the defendant was especially careful and guarded in the relief asked of the court. *It did not ask for the dismissal of the action.* The state practice as to special appearance is not controlling in the Federal Court, as we have already shown.

There is nothing in the record by the defendant calling for

the entry made by the trial court on the 6th of June (Record, p. 40) so insistently complained of by plaintiff. If the plaintiff was prejudiced by the entry of June 6th, the damage or prejudice was merely nominal, and would not entitle plaintiff to a reversal.

Harward vs. Lee, 85 Ia., 622-627.

Lull vs. Bank, 110 Ia., p. 537.

Rice vs. Whitney, 115 Ia., 748.

The judgment of the trial court was correct, and should not be disturbed.

Respectfully submitted,

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